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Issues involving registration under the Investment Advisers Act of 1940; Personal financial planning practice aid, 1

American institute of Certified Public Accountants

PERSONAL FINANCIAL PLANNING
PRACTICE AID 1

Issues Involving Registration Under the Investment Advisers Act of 1940

AICPA American Institute of Certified Public Accountants

ISSUES INVOLVING REGISTRATION UNDER THE INVESTMENT ADVISERS ACT OF 1940 AICPA

NOTICE TO READERS

Personal Financial Planning (PFP) practice aids are designed as educational and reference material for the members of the Institute and others interested in the subject. They are not intended to establish standards.

The committee gratefully acknowledges the contribution made to the development of this practice aid by Barry Barbash, Esq., of Willkie Farr & Gallagher, and former committee member Wanda Lorenz.

PERSONAL FINANCIAL PLANNING
PRACTICE AID 1

Issues Involving Registration Under the Investment Advisers Act of 1940

American Institute of Certified Public Accountants

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Preface

This practice aid, developed by the Personal Financial Planning Committee (the Committee), is intended to help certified public accounting (CPA) firms engaged in personal financial planning to determine if they are required to register as investment advisers under the Investment Advisers Act of 1940 (the Act). Determining whether a CPA firm is required to register under the Act involves a complicated area of the law. An assessment of a CPA firm's potential obligation to register requires a careful examination based on the facts and circumstances of the firm's practice.

This practice aid considers only the federal registration and reporting requirements under the Act. The laws of many states contain requirements that may prove to be more significant and far-reaching, from a CPA's viewpoint, than the federal requirements. CPAs should review the laws of the states in which they practice and in which their clients are located to determine the registration requirements under those laws. The practice aid is not intended to discuss all the advantages and disadvantages of offering investment advice to clients but is limited to a discussion of registration issues.

The practice aid is composed of two parts and six appendixes. Part 1 provides some background information about personal financial planning. Part 2 is an analysis prepared by the outside legal counsel of the American Institute of Certified Public Accountants (AICPA), Willkie Farr & Gallagher. Part 2 is not intended to provide a legal opinion on any particular set of facts; it is intended to provide guidance on issues arising under the Act for CPAs engaged in personal financial planning. Part 2 refers to certain views of the Securities and Exchange Commission (SEC) staff. These views can change from time to time. Appendix A sets out the text of certain letters to the SEC staff from CPA firms seeking guidance on registration under the Act. Appendix B sets out the provisions of the Act, Appendix C the general rules and regulations under the Act, and Appendix D the text of a 1981 interpretative statement from the SEC staff concerning the applicability of the Act to financial planners. Appendix E presents Form ADV and instructions, and Appendix F is a statement of certain interpretative positions of the SEC staff regarding the form.

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Synopsis

The financial planning services that certain CPAs provide to their clients may require those CPAs to register under the Investment Advisers Act of 1940 (the Act). In general, a CPA firm or CPA would not be required to register under the Act if either of the following is applicable:

1. The financial planning services provided by the CPA firm or CPA are such that the CPA firm or CPA does not meet the definition of "investment adviser" contained in the Act.
2. The CPA firm or CPA meets the definition of investment adviser, but may rely on the accountant's exception from the definition contained in the Act. If the CPA firm or CPA may rely on the accountant's definitional exception, then the firm or CPA is subject to none of the Act's provisions.

Part 1 — Background

WHAT IS PERSONAL FINANCIAL PLANNING?

Historically, CPAs have advised clients in financial matters related to both business and personal affairs. This financial advice and the related planning for the future are an integral part of the traditional services provided by CPAs. Personal financial planning services have always been important to the clients of CPAs.

As noted in recent literature, "CPAs are in an excellent position to serve as personal financial planners. They have already developed a relationship with their clients based on mutual trust and respect. In addition, CPAs have long been recognized and appreciated by clients as a source of independent, objective information."[1]

The term *personal financial planning* has been applied to a variety of activities and is often used without a precise definition of its meaning. Definitions in the literature and in use often do not adequately describe the types of personal financial planning services provided by CPAs.

The Committee generally believes that the typical CPA defines personal financial planning as a process of helping the client take financial control of his life. Money management is necessary to provide funds for a home, education, travel, and other activities such as business and retirement. Sound financial decisions involve a series of choices and an awareness of consequences. The client needs good information about his financial situation and options. The CPA helps clients identify financially sound options. The process of financial planning may include collecting all financial data; calculating present net worth; analyzing income, expenses, and insurance coverage; projecting future

1. Robert M. Mehlinger and David H. Culp. "Personal Financial Planning Services," *Journal of Accountancy* (September 1984):126.

income and expenses; identifying and prioritizing objectives; developing financial strategies for achieving those objectives; and updating the plan to review the goals and progress.

TYPES OF PERSONAL FINANCIAL PLANNING SERVICES PROVIDED BY CPAs

CPAs have always provided financial advisory services for clients. CPAs are well positioned to provide comprehensive financial planning for a wide range of clients, including, for instance, executives of corporate clients and owners of closely held companies. CPAs draw from multidisciplinary skills in performing financial planning, and have a broad knowledge of income and estate tax planning. CPAs use accounting and auditing expertise in preparing analyses and projections, the basic tools of personal financial planning. The various levels of planning include the following:

1. Providing personal financial planning as a service incidental to other areas of accounting practice
2. Providing single-issue planning services for income tax, estate tax, retirement, or other areas
3. Providing personal financial planning services as the coordinator of a group of specialists
4. Providing comprehensive financial planning services by offering a variety of interrelated services to individuals or family groups for the management of their financial resources. In this type of financial planning engagement, the CPA seeks to develop for the client a hierarchy of financial goals and a series of implementation strategies to achieve the client's needs. The elements of the process include the following:
   - Collecting and assessing all relevant data that the client provides
   - Identifying the client's financial goals and objectives
   - Identifying the client's financial problems
   - Developing recommendations and alternative solutions for the client
   - Coordinating the implementation of the recommendations given to the client
   - Providing the client with periodic reviews to update the financial plan

CPAs providing personal financial planning services enlist different strategies depending upon client needs.

CONCERNS ABOUT REGISTRATION UNDER THE ACT

In a 1981 interpretative statement, the text of which is set out in full in Appendix D of this practice aid, the SEC staff stated that providing certain

financial planning services may require the provider to register as an investment adviser under the Act. The staff's statement, which is analyzed in part 2 of this practice aid, may be read as suggesting that financial planning is generally synonymous with providing investment advice. The Committee believes that many financial planning engagements of the type performed by CPAs may involve no rendering of investment advice.

The Committee also believes that many CPAs may broadly interpret the SEC staff's 1981 release as indicating that any CPA who provides any form of financial planning services must register as an investment adviser under the Act. The Committee supports the narrower interpretation suggested in part 2 of this practice aid: a CPA firm or CPA may provide certain financial planning services, including comprehensive personal financial planning, without meeting the definition of an investment adviser under the Act. In addition, a CPA providing financial planning services of the type that would cause the firm or CPA to meet the Act's definition of investment adviser may be able to rely on the accountant's exception from the definition. That exception is described in detail in part 2. Registration is not necessary for CPAs who either do not meet the definition of an investment adviser or who are able to rely upon the accountant's exception.

The Committee believes that registration by a CPA firm or a CPA as an investment adviser is not a matter to be taken lightly. The Committee recommends that a CPA or CPA firm consider very carefully any decision to register if the CPA or CPA firm is not legally required to do so. Registration raises a number of concerns, including the following:

- Investment advisers registered under the Act are required to keep various books and records, which are described in detail on page 18 of this guide and which may be examined by the SEC.
- Investment advisers registered under the Act must provide their clients with a disclosure document that may prove to be difficult and expensive for a CPA firm or a CPA to produce. The disclosure obligation is described on page 19.
- Certain state securities authorities have promulgated investment adviser registration requirements that are different and more extensive than the requirements that must be met under the Act. Some states, for example, require investment advisers registered in the state to file audited balance sheets with the state.
- Registered investment advisers are required to institute adequate procedures to obtain prompt records of every security transaction in which certain partners, employees, and other "advisory representatives" have acquired a direct or indirect beneficial interest.

Part 2 — Registration Under the Act: The Basics

In August 1981, the SEC published the views of its Division of Investment Management on the applicability of the Investment Advisers Act of 1940 to "financial planners" and other persons who provide investment advisory services to others for compensation as an integral component of other financially related services.[2] The stated purpose of the 1981 Release was to provide the public with the SEC staff's position concerning the circumstances under which financial planners must register and are subject to the substantive requirements of the Act. The 1981 Release raises, among other questions, the issue of when a CPA firm or a CPA rendering financial planning services must register under the Act.

DEFINITION OF AN INVESTMENT ADVISER

Section 203 (a) of the Act requires any person[3] who meets the Act's definition of an investment adviser to register under the Act, unless the person qualifies for any one of a number of exceptions from registration set out in the Act.

The term *investment adviser* is defined in Section 202(a)(11) of the Act to mean

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .

APPLICABILITY TO FINANCIAL PLANNERS

Whether a financial planner must register under the Act generally depends upon an analysis of all relevant facts and circumstances. According to the 1981 Release, if the analysis shows that the planner's activities satisfy *all* elements of

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2. SEC Investment Advisers Act Release No. 770 (August 13, 1981) [hereinafter referred to as the "1981 Release"]. See Appendix D of this practice aid.

3. The Act defines *person* to include a natural person or a company. As used in part 2 of this practice aid, *person* generally can be applied to a CPA firm that is a sole proprietorship, a partnership, or a professional corporation.

the Act's definition of investment adviser, then the planner must register under the Act, unless the firm can rely on a particular exception.

As suggested above, the definition of an investment adviser consists of three elements: (1) providing advice, or issuing reports or analyses, on securities; (2) being in the business of providing those advisory services; and (3) providing those services for compensation. Each of these three elements is described below.

Advice or Analyses Concerning Securities

Security is defined broadly in Section 202(a)(18) of the Act to mean, among other things, any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, or investment contract. Examples coming within the definition include the following:

- Mutual fund shares
- Limited partnership interests
- Syndicated investments in, for example, cattle, racehorses, or motion pictures
- Certain insurance products, such as variable annuities

In the 1981 Release, the SEC staff expressed the view that "a person who provides advice, or issues or promulgates reports or analyses, *which concern securities, but which do not relate to specific securities, would generally be an investment adviser* under Section 202(a)(11) . . . ." [emphasis added]. The staff has also stated that the definition of the term *investment adviser* includes "persons who advise clients either directly or through publications or writings *concerning the relative advantages and disadvantages of investing in securities in general as compared to other investment media*" [emphasis added]. Note, however, that whether a person provides general or specific advice does have a bearing on whether that person is considered "in the business" of providing investment advice. See "In the Business" on page 7. Four illustrations concerning the providing of investment advice follow.

- In the course of developing a financial program for a client, Mr. X, a financial planner, advises the client about the desirability of investing in securities instead of, or in relation to, stamps, coins, or direct ownership of commodities. According to the SEC staff's position, Mr. X is providing advice on securities.
- Ms. A, a financial planner and pension consultant, advises those in charge of an employee benefit plan on funding plan benefits by investing in securities, as opposed to, or in addition to, insurance products, real estate, or other funding media. According to the SEC staff, Ms. A is providing advice as to securities.

- Mr. R provides advice to a client on the selection or retention of an investment manager or managers. In the 1981 Release, the SEC staff took the position that Mr. R could, in certain circumstances, be deemed to be advising others within the meaning of Section 202(a)(11) of the Act.
- Ms. B, when requested by her clients, provides a list of investment advisers, without recommendation, in conjunction with her business as a financial planner. The 1981 Release suggests that Ms. B is not providing investment advice.

In the Business

A person who provides investment advice for compensation, but who is not *in the business* of advising others about the value of securities or the advisability of investing in securities, or who does not issue reports or analyses concerning securities as part of a regular business, does not come within the Act's definition of investment adviser.

The SEC staff has stated in the 1981 Release that whether a person's activities constitute being in the business of providing advisory services will depend on (1) whether the investment advice being provided is *solely incidental* to a noninvestment advisory, primary business of the person providing the advice, (2) the specificity of the advice being given, and (3) whether the provider of the advice is receiving, directly or indirectly, any special compensation for the advice.

The staff has also indicated in the 1981 Release that, as a general matter, it would take the position that a person who provides financial services, including investment advice for compensation, "is in the business" of providing investment advice, unless the advice is *solely incidental* to a noninvestment advisory business, is nonspecific, and is not rewarded by special compensation. Recently, the staff has added that the fact that investment advice "may not be the major or most important information provided [by a person] does not necessarily make such advice solely incidental to another non-investment advisory business."[4]

The SEC staff has applied the above general criteria to a variety of factual situations, including those in which a person (1) holds himself out as an adviser, (2) provides general advice and is not in the principal business of providing investment advice, (3) provides specific securities recommendations, (4) provides market timing advice, and (5) receives special compensation.

Holding Out as Adviser

According to the 1981 Release, a person who holds himself out as an investment adviser or as one who provides investment advice is considered to be in the business of providing investment advice.

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4. Letter from the SEC's Division of Investment Management to Computer Language Research, Inc. (December 26, 1985).

Principal Business Is General Advice, Not Investment Advice

According to the 1981 Release, a person whose principal business is providing financial services other than investment advice would not be considered "in the business" if, as a part of the services, he discusses in general terms the advisability of investing in securities in the context of, for example, a discussion of economic matters or the role of investments in securities in a client's overall financial plan. The following examples illustrate the point.

- Mr. G is a financial planner whose business primarily consists of selling traditional fixed annuity policies. Moreover, Mr. G holds himself out as selling only fixed annuity policies. In the course of a meeting with a client, Mr. G says: "Although we are here to talk about annuities, Mr. Client, I think some portion of your investments should be in securities." Mr. G is not in the business of providing investment advice if he regularly makes statements similar to the one above.

- Ms. H is a CPA who regularly advises clients about their taxes and other financial affairs. In the course of a meeting with a client, Ms. H states, "In order to reduce your income taxes, some portion of your investments should provide tax-exempt income." Ms. H is not in the business of providing investment advice if she regularly makes statements similar to the one above.

- Mr. K is a CPA whose business consists of providing a full range of typical accounting services, such as tax planning. Except in rare and isolated instances, the investment advice he provides as part of his accounting services is limited to merely discussing in general terms the role of investments in securities in regard to the clients' overall investment plan. Mr. K should not be regarded as being in the business of giving investment advice.

Specific Securities Recommendations

The SEC staff said, in the 1981 Release, that a person is "in the business" if, "*on anything other than rare and isolated instances,* he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or special categories of securities (e.g., bonds, mutual funds, technology stock, etc.)" [emphasis added]. The staff took the position recently, for instance, that a computer company that developed and marketed a comprehensive financial plan processing service that provided individuals with recommendations "with respect to securities in general and may provide advice regarding specific categories of securities, such as tax-exempt securities [and] growth potential equities," could be deemed to be in the business of providing investment advice.[5]

5. Letter from the SEC's Division of Investment Management to Computer Language Research, Inc. (December 26, 1985).

Market Timing

A person who provides market timing services is viewed by the SEC staff, in the 1981 Release, as being in the business of giving investment advice.

Receipt of Special Compensation

A person is regarded by the SEC staff as being in the advisory business if he receives any special compensation for the services he provides or receives any direct or indirect remuneration in connection with a client's purchase or sale of securities.

According to the 1981 Release, a person would generally not be considered to be receiving special compensation for providing advisory services if he assesses no charge for the advisory portion of his services or if he charges an overall fee for financial advisory services of which the investment advice is an incidental part.

Compensation

The definition of *investment adviser* contained in the Act applies to persons who give investment advice and receive *compensation* for it.

No Need for Separate Fee

The SEC staff said in the 1981 Release that a separate fee need not be charged for investment advice for the "compensation" element of the definition of investment adviser to be met.

According to the 1981 Release, the "compensation" element would be satisfied "if a single fee were charged for the provision of a number of different services, which services include the giving of investment advice or the issuing of reports or analyses concerning securities." However, as suggested above, a person's charging no separate fee for the investment advisory portion of services provided *could* be relevant to whether the person is " in the business" of giving investment advice.

Indirect Fee

The SEC staff said in the 1981 Release that it is not necessary that an adviser's compensation be paid directly by the person receiving investment advisory services, but only that the investment adviser receive compensation from *some source*.

FINANCIAL PLANNERS AS INVESTMENT ADVISERS

Recent SEC staff interpretive letters seem to suggest a staff belief that most financial planners provide services resembling those traditionally provided by investment advisers, and thus those planners should register under the Act.

In a recent letter, the SEC staff stated that "*generally* a person engaged in financial planning activities *must register* as an investment adviser under the

Investment Advisers Act of 1940."[6] But, as noted by SEC chairman John S. R. Shad in testimony on June 11, 1986, before the House Subcommittee on Telecommunications, Consumer Protection and Finance, "Not all financial planners are investment advisers. . . ."

When Registration Is Not Required

The SEC staff has suggested that a person engaged in financial planning activities is not required to register under the Act only if the planner gives advice no more involved than a mere discussion in general terms of the advisability of investing in securities in the context of a discussion of economic matters or the role of securities in a client's overall financial plan, and either (1) does not discuss more frequently than on rare and isolated instances the advisability of investing in specific securities or specific categories of securities, or (2) does not issue reports or analyses about specific securities or specific categories of securities.[7]

CPA FINANCIAL PLANNERS AND REGISTRATION: THE ACCOUNTANT'S EXCEPTION

What seems clear from the SEC staff's various interpretive positions under the Act is that a CPA firm providing certain financial services could meet the general definition of an investment adviser. The Act contains, however, certain specific exceptions from the definition of investment adviser. These definitional exceptions should be contrasted with the exceptions from *registration* under the Act, which are described in this practice aid on page 17. Whether a person can take advantage of an exception from the definition of investment adviser generally depends upon relevant facts and circumstances, according to the 1981 Release.

A CPA firm or CPA may provide certain financial planning services without meeting the definition of an investment adviser under the Act. In addition, a CPA providing financial planning services of the type that would cause the firm or CPA to meet the Act's definition of investment adviser may be able to rely on the accountant's exception from the definition.

Introductory Note on Material

To date, no court appears to have expressly considered either the general applicability of the Act to accountants or the limits of the accountant's exception from the definition of investment adviser contained in the Act. As you will

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6. Letter from the SEC's Division of Investment Management to Roney & Co. (March 4, 1985) (emphasis added).
7. Letter from the SEC's Division of Investment Management to Linda Arnold (August 23, 1984).

see in reading the following materials, the SEC staff has articulated its views on both issues. You should keep in mind, when considering those views, the SEC's stated position that interpretations articulated by the SEC staff do not constitute official SEC expressions on any issue and that staff positions are subject to reconsideration and should not be regarded as precedents binding on the SEC. You should be aware that competent legal counsel may conclude that positions of the SEC staff would not be supported by a court and may recommend that a client take action that is not consistent with an SEC staff position. You should recognize, however, that a court, in considering an issue of interpretation under the Act, would in all likelihood give some deference to stated SEC staff positions.

Exception From the Definition of Investment Adviser

Section 202(a)(11)(B) of the Act provides that the definition of investment adviser does not include "any lawyer, *accountant,* engineer, or teacher whose performance of [investment advisory services causing him to meet the Act's general definition of investment adviser] is solely incidental to the practice of his profession" (emphasis added).

The "Solely Incidental" Requirement

The SEC staff has enumerated three factors it considers relevant in determining whether an accountant or accounting firm provides investment advice that is "solely incidental" to the practice of accounting: (1) whether the accountant (or firm) holds himself (or itself) out to the public as an investment adviser; (2) whether the advisory services rendered are in connection with and reasonably related to accounting services; and (3) whether the fee charged for advisory services is based on the same factors as those used to determine the accounting fee.[8]

Importance of the "Holding Out" Component

The SEC staff has suggested that, of the three factors listed above, the "holding out" component may be the most important. As the staff noted recently, "the exception is *not* available to an accountant who holds himself out to the public as providing *financial planning,* pension consulting, or other financial advisory services. The performance of investment advisory services by such a person is deemed to be incidental to the practice of his financial planning or pension consulting profession and not incidental to his practice as an accountant."[9] The SEC staff's recent letters discussing the "holding out" com-

8. Letter from the SEC's Division of Investment Management to Hauk, Soule & Fasani, P.C. (April 2, 1986), letter to Trejo & Associates (December 19, 1985), and letter from the SEC's Division of Investment Management to David R. Markley (February 6, 1985).
9. Ibid. (emphasis added).

ponent of the accountant's exception have been questioned and criticized by a number of accountants and their legal counsel, who argue that the letters suggest as a general matter that financial planning is not part of the practice of accounting. Financial planning, these accountants and lawyers assert, has always been and will always be a significant part of the practice of accounting. A more specific criticism made by accountants and lawyers of the SEC staff's recent "holding out" letters is that the letters suggest that an accountant's merely holding himself out as a financial planner would cause the accountant to lose the use of the accountant's exception.

As important as the "holding out" component is considered to be by the SEC staff in its position on the availability of the accountant's exception, the mere "holding out" by an accountant that he provides "financial planning services" should not in and of itself require registration. Whether the accountant has an obligation to register depends on the nature of the services provided.

Receipt of Commission-like Fees

In a very recent letter, the SEC staff stated that an accountant accepting commission-like fees for recommending securities to his clients would not be able to rely on the accountant's exception. The staff noted that receipt of a commission-like fee would preclude reliance on the exception "because this type of fee is not based on the same factors that determine accountants' usual fees for accounting services."[10]

Caveat About Exception

The SEC staff apparently believes that the accountant's exception covers accountants but not accounting firms. Thus, for instance, the staff believes that the exception would be unavailable to an accountant who in his individual capacity provides investment advice while being employed by an accounting firm that renders no such advice. The staff also believes that a group of nonaccountants who provide investment advice and who are employed by or associated with an accounting firm would not have the benefit of the exception.

HYPOTHETICAL EXAMPLES

Set out below is a set of sample situations involving accountants who provide financial planning services. Each example includes a discussion of factors that might be considered in deciding whether or not registration is required. The various discussions are not intended to represent legal conclusions on any of the situations. If your accounting practice involves any of the issues raised in the sample situations, you might consider consulting with competent legal counsel to assess your potential registration obligations under the Act. Note that some, though not all, of the situations are based on facts presented to the

10. Letter from the SEC's Division of Investment Management to *Financial Planning* (International Association for Financial Planning, May 21, 1986).

SEC staff for its consideration. Moreover, SEC staff positions are subject to reconsideration and do not constitute an official expression of the SEC's views on this issue.

Example 1. Mr. F is a CPA with an active practice. He spends the great majority of his time reviewing and preparing miscellaneous tax returns and analyzing the tax consequences of various corporate transactions. From time to time, in reviewing a tax return of a particular client, Mr. F suggests that the client might consider tax shelters or mutual funds. Mr. F can rely on the Act's accountant's exception. He appears to meet the "solely incidental" test as articulated by the SEC staff. Mr. F appears not to be holding himself out as an investment adviser, the advisory services he is rendering appear to be related to the accounting services he is providing, and he appears not to be charging a special fee for his advisory services.

Example 2. Mr. M is a CPA who advertises "planning service" as a special service available in his accounting practice. Moreover, Mr. M expects that planning will be the major emphasis of his practice. He plans to practice complete financial planning for a fee and also to offer assistance and opinions on particular investments, IRA plans, tax shelters, and business investments. In addition, he contemplates some form of investment newsletter or general newsletter with some investment information. Mr. M cannot rely on the Act's accountant's exception, according to the SEC staff's position. Mr. M appears to be holding himself out as a financial planner who is providing investment advice.[11]

Example 3. Messrs. A, B, and C, partners in an accounting firm, desire to act as "offeree representatives" in connection with the private offerings of limited partnership interests in oil and gas partnerships. The three men contemplate explaining to, and discussing with, prospective investors in the partnerships matters such as the risks of investing in the partnerships and the past performance of similar offerings of the general partner of the partnerships. In addition, Messrs. A, B, and C contemplate providing prospective investors with summaries, explanations, and other general assistance relating to the limited partnership interests. Messrs. A, B, and C cannot rely on the Act's accountant's exception, according to the SEC staff's position. The proposed activities of Messrs. A, B, and C would not be considered incidental to their accounting practice.[12] Note that this situation raises the issue of accountants' promotion of particular securities, a practice that is not permitted by certain states.

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11. Letter from the SEC's Division of Investment Management to David R. Markley (February 6, 1985).
12. Letter from the SEC's Division of Investment Management to Kenisa Oil Company (April 6, 1982).

Example 4. Ms. J, CPA, holds herself out as providing personal financial planning services and also provides accounting and tax services. Except in rare and isolated instances, the investment advice she provides as part of her financial planning service is limited to merely discussing in general terms the role of investments in securities in regard to the clients' overall investment plan. Although Ms. J is holding herself out as a financial planner, the kind of investment advice that she is providing as part of her financial planning services would appear not to be of the type that would cause her to meet the definition of investment adviser. Although it would appear she should not need to register as an investment adviser, the SEC staff may take a contrary position.

Example 5. N&E CPAs is an accounting firm. The principals of N&E, as part of the firm's normal practice, are asked by clients to (1) analyze and recommend tax-advantaged investments, (2) recommend money market and mutual fund investments, (3) analyze and recommend insurance and annuity programs, and (4) render advice on investments in commercial paper and certificates of deposit. N&E has neither discretionary management of accounts nor custody of any client's funds. N&E furnishes all its advice through consultations, and charges fees based on an hourly rate. None of N&E's employees and partners accepts fees or commissions from promoters. Three times a year N&E publishes a newsletter containing articles about taxes and various kinds of investments. No specific investments are recommended in the letter, and no fee is charged for it. N&E analyzes real estate programs, not only by evaluating accounting data and projections, but also by performing a physical inspection of the property involved. In some circumstances, N&E acts as a "purchaser representative" as defined in Regulation D under the Securities Act of 1933, as amended. The facts presented above seem insufficient to determine whether N&E may rely on the accountant's exception.[13] N&E's ability to rely on the exception would appear to depend to a large extent on the nature of the analysis and on recommendations it provides with respect to the tax-advantaged and other types of investments listed above. If N&E's analysis involved, for example, making projections or assessing financial statements of issuers, N&E's case for relying on the exception would be stronger than if N&E provided clients with recommendations that clients make particular investments. In addition, if N&E's recommendations were generic (for example, "Mr. Client, you might consider mutual funds"), N&E's case for relying on the exception would be better than if N&E's recommendations were specific (for example, "Mr. Client, you might consider the ABC Long-Term Bond Fund"). Note also that in the factual situation described above N&E sometimes acts as a purchaser representative as defined in Regulation D under the Securities Act of 1933. As

13. Letter from the SEC's Division of Investment Management to Jones & Kolb (May 7, 1984), and letter from the SEC's Division of Investment Management to LaManna & Holman (February 18, 1983).

noted on page 13 of this practice aid, the SEC staff in its letter to Kenisa Oil Company took the position that serving as offeree representatives precluded certain accountants from relying on the Act's accountant's exception.

Example 6. XYZ CPAs is a medium-sized accounting firm that recently established a financial planning team. In providing financial planning services to clients of XYZ, the team follows a four-step approach consisting of (1) presenting clients with a seminar generally addressing topics such as goal setting, money management, income tax planning, tax shelters, estate planning, trusts, wills, insurance, and investments; (2) collecting data from clients on their assets, liabilities, and cash flow; (3) using computer software programs that project net worth, income tax liability, and cash flow of clients; and (4) reviewing annually each client's personal financial plan to determine whether the client's goals have been achieved and whether those goals need to be adjusted. The XYZ financial planning team views its general role as that of a coordinator. Thus, for instance, if, in applying its four-step approach to a particular client, the team determines that the client should consider investing in equity securities, the team recommends that the client employ an investment adviser. When the client asks for a recommendation of a particular investment adviser, the team provides a list of local advisers rated by a national rating service. The issue raised by the factual situation described above is the establishment of a financial planning team. An argument may be made that XYZ, by setting up the team, is holding itself out as being in the financial planning business, and that, as a result, the financial planning business is not solely incidental to XYZ's accounting practice and therefore not covered by the accountant's exception. Note that, even if XYZ's financial planning business is not covered by the accountant's exception, XYZ would not need to register under the Act so long as XYZ's financial planning business involved activities not resulting in XYZ's meeting the definition of investment adviser. In this case, XYZ could argue that it did not meet the definition. The securities advice provided to clients appears to be general and focused on the role of securities in a client's overall financial plan. Moreover, the securities advice provided by the team appears not to be directed toward specific securities; in its role as coordinator, the team recommends that clients use investment advisers for advice about particular securities.

Example 7. Assume that ABC CPAs provides services identical to those provided by the XYZ team already described, but does not establish a financial planning team. Unlike the XYZ team, ABC charges a special flat fee for its services. Assume ABC is deemed not to be holding itself out as being in the financial planning business. ABC's situation raises the question of fees in determining the applicability of the accountant's exception. As noted above, the SEC staff has suggested that the kind of fee charged by an accountant is relevant in determining whether the accountant can rely on the exception. ABC is charging a fee for its financial planning services that differs, presumably, from

its standard hourly fees. ABC's charging a different kind of fee for financial planning could result in ABC's not being able to rely on the accountant's exception. On the other hand, ABC could argue that the flat fee differs from a percentage-of-assets-under-management fee typically charged by an investment adviser, and that as a result the fee should not cause ABC to lose the benefit of the exception. In addition, if ABC in certain circumstances charged a flat fee for services in the audit, tax, and management advisory areas of its practice, it could argue that its fee for financial planning services is not different from the sort of fee it typically charges for other services. Note also that ABC, like XYZ, can make strong arguments that, even if its financial planning business is not covered by the exception, the firm does not need to register under the Act because its financial planning business involves activities not causing ABC to meet the definition of an investment adviser.

Example 8. Assume that LCM CPAs provides services identical to those provided by the XYZ team already described. Unlike the XYZ team, however, LCM recommends to clients only investment advisers with whom LCM is familiar. LCM receives no finder's fee or the like for recommending clients to a particular adviser. Assume LCM is deemed not to be holding itself out as being in the financial planning business. LCM represents a harder case than does XYZ with respect to registration under the Act. As noted above in "Registration Under the Act: The Basics," a person who recommends investment advisers may be deemed to be rendering investment advice for purposes of the Act. Thus, by recommending particular investment advisers, LCM could be viewed as providing more investment advice than XYZ, which appears to be making no specific suggestions about the investment advisers its clients should use. On the other hand, LCM does not hold itself out as being in the business of selecting investment advisers, LCM appears not to be recommending specific securities, and LCM appears not to be charging special fees for the investment advice it provides. It would seem, in light of these factors, that LCM could argue that it is not required to register under the Act.

Example 9. BPB CPAs is a large accounting firm that has established a financial planning department. BPB advertises the skills of the members of the financial planning department in a number of financial newsletters and magazines. The services of the financial planning department are generally limited to income tax planning and estate planning. The department is often asked by its clients to provide its views on particular investments, including tax shelters. In responding to its client's inquiries, the department reports only on the soundness of projections made in prospectuses and on the track records of the promoters of the tax shelters. By virtue of establishing and advertising the existence of a financial planning department, BPB clearly appears to be holding itself out as being engaged in the financial planning business, and the SEC's Division of Investment Management letter to David R. Markley cited on page 11 states that an accountant who holds himself out to the public as providing

financial planning cannot rely on the accountant's exception. The advice BPB provides also appears to relate to specific securities and is not general in nature. In addition, the services BPB provides seem similar to those provided by the accountants described in the SEC's Division of Investment Management letter to Kenisa Oil Company on page 13 of this practice aid. These accountants were told that they could not rely on the accountant's exception. Reasonable arguments would appear to be able to be made, however, that BPB's financial planning business does not involve the kinds of services that would cause BPB to meet the Act's definition of investment adviser. Although BPB advertises its financial planning business, that business is generally limited to income tax planning and estate planning and does not include investment advice. In addition, the advisory services BPB provides—analysis of projections and management—are those traditionally provided by accountants, and they relate to the accounting services BPB provides. Finally, BPB appears not to be charging a special fee for its financial planning services.

Example 10. Assume that the accounting firm of TB&C establishes a financial planning department. Like BPB, TB&C advertises its financial planning department. Unlike that of BPB, however, the TB&C advertisement touts the abilities of TB&C in selecting specific investments. TB&C represents a clearer case than does BPB for registration under the Act. Unlike BPB's financial planning business, TB&C's financial planning business contemplates a significant amount of investment advice; TB&C's advertisement seems to be suggesting that TB&C should be hired not for its accounting expertise, but for its ability to select appropriate investments.

EXCEPTIONS FROM REGISTRATION UNDER THE ACT

Section 203(b) of the Act provides three specific exceptions *from registration* under the Act (as opposed to the accountant's exception, which is an exception from the definition of *investment adviser*). These three exceptions are available to any person meeting the definition of investment adviser.

- *Intrastate Exception.* Section 203(b) (1) of the Act provides an exception for any investment adviser whose clients are all residents of the state within which the adviser maintains his principal office and place of business, and who does not furnish advice or issue analyses or reports about securities listed or admitted to unlisted trading privileges on any national securities exchange. CPAs who rely upon this exception should recognize that they may be subject to certain state registration and reporting requirements.
- *Insurance Company Adviser.* Section 203(b) (2) of the Act provides an exception for any investment adviser whose only clients are insurance companies.

- *Private Investment Advisers.* Section 203(b) (3) of the Act provides an exception for any investment adviser who, during the course of the preceding twelve months, has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to an investment company registered under the Investment Company Act of 1940 or to a "business development company."

An investment adviser who meets one of the exceptions from registration contained in Section 203(b) as listed above is not subject to the registration requirements under the Act, but remains subject to the Act's general antifraud provision. A person who meets an exception from the definition of an investment adviser (including the accountant's exception) is subject to none of the Act's provisions.

CONSEQUENCES OF REGISTERING UNDER THE ACT

A person who registers under the Act is subject to a number of requirements.

Reporting Requirements

The basic reporting form under the Act is the Form ADV registration statement. The Form, which is divided into two parts, requires the reporting person to provide various information, including: (1) information concerning the nature of the reporting person's business; (2) the background, education, and experience of the principals, controlling persons, and employees of the reporting person; (3) information indicating whether the reporting person or persons associated with the reporting person are subject to any disqualification from registration under the Act; (4) information about the amount of assets the reporting person has under management and the type of clients advised by the reporting person; (5) the kinds of investment advisory services provided by the reporting person; and (6) the methods of securities analysis used by the reporting person. Under the Act, the reporting person is required to periodically update or correct the information contained in Form ADV.

Each investment adviser registered under the Act is required to file an annual report on Form ADV-S no later than ninety days after the end of the adviser's fiscal year, unless the adviser's registration under the Act has been withdrawn, canceled, or revoked prior to that date. Form ADV-S requires the investment adviser, among other things, to state whether he is currently engaged in the investment advisory business and whether he has filed all necessary amendments to his Form ADV.

Recordkeeping Requirements

The Act and rules adopted under the Act require registered investment

advisers to maintain records and to provide the SEC with authority to inspect those records.

Required Records

Rule 204-2 under the Act requires a registered investment adviser to maintain various kinds of books and records, including (1) certain journals and ledger accounts; (2) memoranda of orders given and instructions received by the adviser's clients for the purchase, sale, receipt, or delivery of securities; (3) originals or copies of certain communications received or sent by the adviser; (4) listings of, and documents relating to, the adviser's discretionary accounts; (5) copies of all the adviser's written agreements; (6) copies of publications and recommendations distributed by the adviser to ten or more persons and a record indicating the factual basis and reasons for making the recommendations, if the publication does not contain the basis for the recommendation; and (7) a record of certain securities transactions entered into by the adviser or any "advisory representative" of the adviser (as defined in Rule 204-2).

Examination of Records

Section 204 of the Act provides the SEC with the authority to inspect all books and records that an investment adviser is required to keep under the Act.

Disclosure Obligations

Rule 204-3 under the Act, the so-called "Brochure Rule," requires a registered investment adviser to provide a written disclosure statement to clients and prospective clients. The disclosure statement must contain various information about the adviser, including, among other things, (1) the kinds of advisory services the adviser provides, (2) the kinds of clients served by the adviser, (3) the methods of securities analysis used by the adviser, (4) a description of any general standards concerning education and business background that the adviser requires of its employees and principals, and a description of the specific educational and business background of certain of the adviser's principals and employees.

Under Rule 204-3, the disclosure statement can be either a copy of part 2 of the adviser's current Form ADV or a separate document containing at least the information required by part 2 of Form ADV. Most registered investment advisers fulfill the requirements of Rule 204-3 by providing clients and prospective clients with copies of part 2 of Form ADV.

Limitation on Receipt of Performance Fees

Section 205 of the Act generally prohibits a registered investment adviser from entering into an investment advisory agreement with a client who provides for the adviser to be compensated on the basis of a share of capital gains upon, or capital appreciation of, the client's funds or any portion of the client's funds. The SEC recently adopted a rule that permits a registered investment adviser meeting certain conditions to enter into an advisory contract providing

for performance-based compensation of the type generally prohibited under Section 205.[14]

Antifraud Provisions of the Act

Any person who meets the Act's definition of an investment adviser, and who cannot rely on an exception from the definition, including, for example, the accountant's exception (Section 202 (a)(11)), is subject to the antifraud provisions contained in Section 206 of the Act. Thus, included among the group of persons subject to Section 206 are persons relying on the exceptions from *registration* (Section 203 (b)) described previously. Sections 206(1) and 206(2) make it unlawful for an investment adviser, directly or indirectly, to "employ any device, scheme, or artifice to defraud any client or prospective client" or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Supplementing the provisions of Sections 206(1) and 206(2) is the United States Supreme Court's holding that an investment adviser is a *fiduciary* who owes clients an affirmative duty of *utmost good faith,* and *full and fair disclosure* of all material facts.[15]

14. SEC Investment Advisers Act Release No. 996 (November 14, 1985).
15. *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 194 (1963).

Appendixes

Appendix A

Text of Letters to the SEC Staff

A Word of Introduction

In reading part 2 of this practice aid, you will have noticed certain references to letters from the SEC's Division of Investment Management (the Division) to various parties. The Division is the section of the SEC's staff responsible for administering, among other statutes, the Investment Advisers Act of 1940. In responding to requests from members of the public concerning the operation of the Act, the Division, like the SEC's other divisions, typically uses one of two formats — the "no-action" letter, or the interpretative letter or release.

A no-action letter is one in which an authorized SEC staff official indicates that the staff would not recommend to the SEC that enforcement action be taken should the activity described in the incoming correspondence be effected. In general, the staff position reflected in a no-action letter relates only to potential SEC enforcement action taken pursuant to the specific statutory provisions and regulations cited by the writer, and addresses only the issue of enforcement action; no-action letters generally do not reflect legal conclusions of the staff. In responding negatively to a no-action letter, the staff ordinarily will state that it is unable to assure the writer that the staff would not recommend enforcement action to the SEC should the transaction be effected in the manner proposed by the writer.

An interpretative letter or release from the SEC staff deals more directly with a particular legal issue than does a no-action letter. In an interpretative letter or release, an authorized SEC staff official provides an interpretation of a specific statute, rule, or regulation in the context of an actual situation.

The SEC takes the position that no-action letters, interpretative letters, and interpretative releases reflect the positions of the SEC staff, *but do not constitute an official expression of the SEC's views on any issue.* Moreover, the SEC has suggested generally that all no-action and interpretative responses by the staff are subject to reconsideration and *should not be regarded as precedents binding on the SEC.*

Set out below is the text of a number of letters* to the SEC staff written by accountants seeking guidance on the issue of registration under the Act. The Committee believes CPA firms may find these letters helpful in assessing the need to register under the Act. As you will see, some of the letters are cited in part 2 of this practice aid. Note that competent legal counsel may conclude that positions reflected in SEC staff letters would not be supported by a court and recommend that a client take action that may not be consistent with those positions.

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Inquiry

Maynard B. Hurwitz
Certified Public Accountant
Suite 302
2423 Camino Del Rio, South
San Diego, CA 92108

July 19, 1977

Ms. Anne Jones, Director
SEC Investment Management Division
Washington, DC 20549

Dear Ms. Jones,

A recent article in the Wall Street Journal told of the SEC's desire to re-register all investment advisors for purposes of gathering information needed for tougher regulation of investment advisors.

As a Certified Public Accountant, and a soon to become Certified Financial Planner, I have, in my short acquaintanceship in the field, observed that there are few people operating in a professional manner as investment advisors or financial planners in the San Diego area. I have recently joined the International Association of Financial Planners, San Diego Chapter, and have found that, even in this professional organization, the same situation exists — sales motivation excels over professional consideration.

As a CPA–CFP, I hope to offer a "full service" to my clients and will not be selling a product nor receiving a commission on any products I might recommend, my remuneration for said service will be on a time fee basis. I believe that the SEC should address itself to the fee-commission and disclosure requirements to the clients, because this is a very cloudy area.

I definitely am in favor of tougher regulations for investment advisors. Too, I think a more definite definition is needed for investment advisers vs. financial planners. A uniform state's law may be a partial method for tougher regulations. I have just learned that the International Association of Financial Planners is attempting to create such a law or act, and is working with two eastern states. I would hope that the SEC would have some position of guidance in the formation of a uniform law.

I sent the SEC a letter asking about my own requirements for registering with the SEC. My questions or points of inquiry were not answered, but I did receive all the literature and applications to apply, which left me confused. I have not registered yet, but assume that I will need to in the next month or so, when I enter the field.

I would appreciate any comments you might have on my CPA–CFP situation. I believe that I will be the first California CPA–CFP, and possibly the first in the United States.

Very truly yours,

Maynard B. Hurwitz
Certified Public Accountant

Response

Office of the Chief Counsel
Divison of Investment Management
Our Ref. No. 77-585CC
Maynard B. Hurwitz
File No. 801-13504-3

November 18, 1977

Thank you for your letter of comment on the Commission's recent proposals to adopt new rules and forms under the Investment Advisers Act of 1940 ("Act").

A copy of the proposed rules is enclosed. Your letter has been included in the Commission's public file containing comments on these proposals, and your views will be considered, together with other letters of comment received, in determining further action by the Commission.

Under the Act, an "investment adviser" is any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. There are certain exceptions from this definition, including an exception for any accountant whose performance of investment advisory services is solely incidental to the practice of his profession. We note that you recently filed an application to register under the Act as an investment adviser. This seems appropriate since you indicated in your application that you would furnish investment advice through consultation and would issue charts, graphs, formulas and other devices which clients may use to evaluate securities.

Stanley B. Judd, Assistant Chief Counsel
Division of Investment Management

Inquiry

LaManna & Hohman
Certified Public Accountants
One Exchange Street
Rochester, NY 14614

October 13, 1982

Securities & Exchange Commission
Washington, DC 20549

Gentlemen:

We are a Certified Public Accounting firm. As part of our normal services we are frequently asked by clients to:

1. Analyze and recommend tax leveraged investments.
2. Recommend money market fund investments.
3. Analyze and recommend insurance and annuity programs.
4. Render advice as to investments in commercial paper and Bank Certificates of Deposits.
5. Administer money market fund investments.

In connection with this work we receive fees for our time from the client requesting the work. We do not accept fees or commissions from promoters.

However, in connection with the above named work we are uncertain as to whether we should be registered as Investment Advisors under the Investment Advisers Act of 1940.

We respectfully request that you review this data and inform us if we should be registered as Investment Advisors. If such registration is required, please forward the appropriate registration forms and instructions for preparation and filing.

Very truly yours,

Joseph W. LaManna
Certified Public Accountant

Response

Office of the Chief Counsel
Division of Investment Management
Our Ref. No. 82-376-CC
LaManna & Hohman
File No. 132-3

February 18, 1983

You state that you are a certified public accounting firm and that at the request of your accounting clients and for a special fee you (1) analyze and recommend tax leveraged investments, (2) recommend money market fund investments, (3) analyze and recommend insurance and annuity programs, (4) render advice as to investments in commercial paper and bank certificates of deposit, and (5) administer money market fund investments. You ask whether you are an investment adviser subject to registration and regulation under the Investment Advisers Act of 1940 ("Act").

Section 202(a) (11) defines an "investment adviser" to mean, in relevant part, any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include... (B) any... accountant... whose performance of such [investment advisory] services is solely incidental to the practice of his profession. Most, if not all, of the things you would give advice about would be considered "securities" for purposes of the Act. We would consider the performance by an accountant of investment advisory services to be "solely incidental" to his accounting practice where the accountant does not hold himself out to the public as providing investment advisory services and where the accountant renders such services only in connection with the fulfillment of his contract for accounting services. *Cf. Thrailkill & Goodman, P.C. (pub. avail. July 16, 1982) (attorney exception).*

The mere fact that an accountant in the course of rendering accounting services to a client provides the client with investment advice and is compensated for his services would not make the accountant an investment adviser, but for the accountant not to be an adviser in such circumstances the advice must be reasonably related to the accounting services, the charge for such services should be based on the same factors as determine the accountant's usual charges, and the accountant should not hold himself out to the public as providing investment advice. We hope that these guidelines are helpful to you.

Even if a person comes within the definition of an "investment adviser," he may still be excepted from registration, but not from the antifraud requirements of section 206 and the rules thereunder, if all of his clients reside in the state in which he maintains his principal office and place of business and he does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange, or if he had 14 or fewer clients during the preceding 12 months and he neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to a registered investment company or an electing business development company under the Investment Company Act of 1940. We take the position that a person "holds himself out" if, for example, his stationery, letterhead, or building directory indicates that he is an investment adviser or if he lets it be known, by word of mouth, through existing clients, or otherwise, that he is willing to accept new investment advisory business.

Pursuant to your request we are sending to you under separate cover a package of information about registration as an investment adviser.

Stanley B. Judd, Assistant Chief Counsel
Division of Investment Management

Inquiry

Linsk, Kimmel, Blank, Charles & Zimmer
A Partnership of Accountancy Corporations
8201 West Beverly Blvd.
Los Angeles, CA 90048

September 7, 1984

Securities and Exchange Commission
Chief Counsel — Stan Judd, Deputy Chief Counsel
Division of Investment Management
Division of the SEC
450 Fifth NW
Washington, DC 20549

Dear Mr. Judd,

We are requesting a no-action letter from the SEC regarding our potential involvement in investment consulting as it relates to our CPA practice. We are of the impression that as long as the investment consulting, or investment advice, is "incidental" to our CPA practice, we do not fall under any of the SEC's jurisdiction. We also understand that the SEC's jurisdiction is limited to interstate transactions or with out-of-state clients. All our clients are California residents and all the investments we would be reviewing are in California.

We will charge our clients a fee for professional services related to our analysis of the investment, both in accounting and a tax position.

We would like to know how extensive or how restrictive our analysis or involvement in investments should be. For example, can we hire independent consultants to help us analyze the investment? Can we get legal opinion to support the position we take on a particular investment?

Your prompt attention to this matter will be greatly appreciated.

Very truly yours,

Marvin Drabinsky

Response

Office of the Chief Counsel
Division of Investment Management
Our Ref. No. 84-294-CC
Marvin Drabinsky
File No. 132-3

October 3, 1984

The "intrastate" exception to the registration provisions of the Investment Advisers Act of 1940 that you referred to in your letter of September 7, 1984, is found in section 203(b)(1) of that act. Section 203(b)(1) states that the registration provisions of section 203(a) shall not apply to

> any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange.

Section 202(a) (11) (B) of the Advisers Act provides an exception from the definition of investment adviser for "any...accountant...whose performance of such services is solely incidental to the practices of his profession." The mere fact that an accountant, in the course of rendering accounting services to a client, provides a client with investment advice and is compensated for his services would not necessarily make him an investment adviser, but for the accountant not to be an adviser in such circumstances the advice must be reasonably related to the accounting services, the charge for such services should be based on the same factors as determine the accountant's usual charges, and the accountant should not hold himself out to the public as providing investment advice. *LaManna & Hohman (pub. avail. March 21, 1983).*

If an accountant holds himself out to the public as providing financial planning, pension consulting, or other financial advisory services, the exception provided by section 202(a) (11) (B) would not apply because in such circumstances the investment advisory services would not be merely incidental to the accountant's practice of the profession of accountancy. *Investment Advisers Act Release No. 770 (August 13, 1981) (copy enclosed).*

For your information, I am enclosing an investment adviser registration package which includes Form ADV, the application for registration as an investment adviser, and Investment Advisers Act Release No. 281 (Jan. 25, 1971), which sets forth certain procedures to be followed by those requesting no-action or interpretative letters.

Thomas S. Harman
Attorney

Inquiry

David R. Markley
Certified Public Accountant
524 Fairwood Drive
Marysville, OH 43040

November 16, 1984

Chief Counsel's Office
Securities and Exchange Commission
450 Fifth St.
Washington, DC 20549

Gentlemen:

I have received conflicting opinions on the necessity of registering as an investment advisor under the Investment Advisors Act of 1940. Registered financial planners feel that registration is needed. A partner in a Big 8 Accounting firm says that they have no intention of becoming registered, although they plan to advertise financial planning services to the public, which I do not interpret as incidental to the practice of accounting.

My intention and current practice is to advertise planning service as a special service available in my accounting practice. In fact, I expect that planning will be the major emphasis in my practice. To date, I have not charged for investment advice, and do not plan to do so until this question is resolved.

My plan is to practice complete financial planning for a fee, but to also offer assistance and opinion on particular investments, IRA plans, tax shelters, and business investment. I want to practice as an independent advisor, with no sales or referral income. Some type of investment newsletter or general newsletter with some investment information is planned, and one has been sent to tax clients without charge, although a subscription service will be considered. Selected investment publications are available to clients, and are used to make suggestions for investments, including selection of mutual funds.

Very truly yours,

David R. Markley, CPA

Response

Office of the Chief Counsel
Division of Investment Management
Our Ref. No. 84-389-OC
David R. Markley
File No. 132-3

February 6, 1985

Section 202(a)(11) of the Investment Advisers Act of 1940 (Act) defines an "investment adviser" as

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities....

Section 202(a) (11) (B) of the Act states, in part, that an

> "investment adviser"...does not include...any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession....

Three factors are relevant in determining whether an accountant provides investment advice "solely incidental" to accounting and is thus excepted from the registration requirements under the Act. These factors are: (1) whether the accountant (or firm) holds himself out to the public as an investment adviser; (2) whether the advisory services rendered are in connection with and reasonably related to accounting services; and (3) whether the fee charged for advisory services is based on the same factors as those used to determine the accounting fee.

See Jones & Kolb (pub. avail. May 7, 1984).

The exception is not available to an accountant who holds himself out to the public as providing financial planning, pension consulting or other financial advisory services. The performance of investment advisory services by such a person is deemed to be incidental to the practice of his financial planning or pension consulting profession and not incidental to his practice as an accountant. Unless otherwise exempted, such a person would be required to register as an investment adviser. *See Investment Advisers Act Release No. 770 (Aug. 13, 1984).*

For your information, I am enclosing an investment adviser registration packet, which includes Form ADV, and a copy of Investment Advisers Act Release No. 770.

Gerald T. Lins
Attorney

Inquiry

Hauk, Soule & Fasani
A Professional Corporation
Certified Public Accountants

February 20, 1986

Mr. Ken Daniels, Chief Counsel
Office of Investment Management
U.S. Securities & Exchange Commission
450 5th Street, N.W.
Washington, DC 20549

Dear Mr. Daniels:

Hauk, Soule & Fasani, P.C., is a certified public accounting firm. One of the accounting services that we provide to our clients could be described as a "financial planning" service. It involves a more or less comprehensive review of an individual's financial situation. We are writing to request a "no-action" position from your office concerning our status as an "investment advisor" as defined by section 202(a)(11) of the Investment Advisors Act of 1940 (the "Act").

We have reviewed Investment Advisors Act Release No. 770 (August 13, 1981) in detail. For the most part, the guidelines presented in the release have been helpful. We are confident that the nature of the service we provide does not make us subject to the Act's registration and disclosure requirements. Viewed separately, the services we provide fall well within the bounds of a general accounting practice. Accordingly, the exemption provided by clause (B) of section 202(a)(11) should apply.

The question we have does not arise from the nature of our service, but rather from the manner in which it is delivered. We do a portion of our financial planning business in conjunction with a registered broker-dealer and investment advisor. On a fee-only basis, we provide clients of the brokerage firm with the same financial review that we provide our own accounting clients.

In this respect, our factual situation differs from the factual situations discussed in IAA Release 770. Accordingly, it would be appropriate for your office to provide an interpretative or no-action position that addresses our particular situation. We believe that, based on the nature of our activities, we are not an investment advisor as defined in the Act. First of all, we believe that we are not "in the business" of providing investment advice. Second, we believe that we are entitled to rely on the exemption provided by clause (B) of section 202(a)(11). Third, we believe that the nature of our arrangement with the registered broker-dealer and investment advisor would not cause us to become an investment advisor, since we are an independent entity and our arrangement operates on an "arm's-length" basis.

We will organize our discussion as follows. First, we will review generally the nature of the service we provide and the relationship between our firm and the registered broker-dealer/investment advisor. Second, we will review in detail the typical contents of the report we provide. Finally, we will analyze the application of the statute to our activities, and present our conclusion.

Pertinent facts

Hauk, Soule & Fasani, P.C. ("HSF"), employs a professional staff of 6 individuals and provides a full range of accounting services. One of these services could be described as "financial planning." It involves a comprehensive analysis of an individual's financial situation, including cash flow and tax projections. (The next section of this letter will provide a detailed description of the contents of a particular report.) The financial pro-

jections are accompanied by text. The functions of the text are to provide comments and analysis, make suggestions, review and explain the assumptions on which projections are based, and emphasize the limitations inherent in all financial projections.

HSF does not hold itself out to the public as being an "investment advisor" or "financial planner." Although we sometimes refer to the report we provide as a "financial plan" (for lack of a better descriptive term), we identify ourselves to the public as a general practice accounting firm. HSF does not sell or recommend any specific investment or insurance products, and it does not receive any direct or indirect compensation on account of the sale of products by others. HSF does not endorse or recommend any broker or vendor or specific seller of investment or insurance products. If one of our accounting clients specifically requests a referral to an investment or insurance company, we typically provide several names and encourage the client to "comparison shop" before making a decision.

The "financial planning" services we provide are expected to account for less than 15% of the total revenue of the accounting firm. Out of the firm's six professional employees, three are involved in providing these services. One employee devotes about 70% of his time to these services; two others devote approximately 5% of their time to these services.

Approximately two-thirds of the firm's "financial planning" revenue is earned pursuant to an arrangement with Edward D. Jones & Co. ("EDJ"), a registered broker-dealer and investment advisor. EDJ has contracted with HSF to provide a comprehensive accounting report to its clients. This is the same review we provide to our accounting clients. HSF is paid a fixed fee for each report.

A registered representative of EDJ 1) interviews the client to collect information necessary to prepare the report and 2) presents the final report to the client. The contract between EDJ and its clients states that the client is under no obligation to purchase any investments through EDJ. It also makes clear that the service to be provided is an accounting report which will not recommend specific investment products. The contract further explains that the service to be provided does not include investment management or investment supervisory services. It explains that EDJ does not monitor accounts on a continuous basis. Under the terms of the EDJ client contract, the investment advisory relationship ends once the report is provided.

The disclosure statement or "brochure" provided by EDJ to its clients reiterates the points stated above. It also explains the nature of EDJ's contract with HSF and reviews the educational and business background of the HSF personnel who prepare the reports.

The business rationale behind this arrangement may provide a useful perspective. HSF is located in St. Louis, Missouri. The home office of EDJ is also in St. Louis, but its sales offices are spread throughout 34 different states, predominantly in rural areas. The type of service provided by HSF frequently is not available from accounting firms in these areas. EDJ believes that its clients can benefit by obtaining a financial review from someone who is not in the business of selling securities. EDJ hopes that it will generate good will—and eventual sales—by making this type of service available to its clients. HSF, for its part, is able to increase its revenues by servicing these individuals.

As stated previously, the preparation of these reports for EDJ comprises about two-thirds of the accounting firm's revenues from "financial planning" services; the preparation of these reports for clients of the accounting firm accounts for the other one-third. Together, these activities provide less than 15% of the total revenue of the accounting firm. In a typical year, HSF expects to complete somewhat less than 100 reports of this type.

The report provided is essentially the same, regardless of whether it is prepared on a

contract basis for a client of EDJ, or provided for an individual client of the accounting firm. As stated previously, these reports do not endorse or recommend any specific investment products or sellers of investment products. Products and sellers are not even mentioned by name in the report, except if necessary to describe a particular item on the statement of financial condition. (For example, "XYZ, Inc., common stock 255 shares.")

The software used to prepare this report is owned by The Capital Planning Group ("CPG"). HSF is the sole general partner of CPG, with a 66 2/3% interest. EDJ is the sole limited partner of CPG, with 33 1/3% interest. CPG does not do any business with the public; its sole purpose is to act as the owner of software. The only assets of CPG consist of several financial planning software programs and some computer terminals and printers. The only economic activity within CPG is that associated with maintaining its software and hardware. The only user of the software is HSF; it does not pay any fees for this use. No income flows through CPG to either its general or limited partner.

Again, a brief description of the business rationale for this arrangement may be helpful. The partnership agreement provides that both parties have the non-exclusive right to own and use the software in the event of a dissolution of the partnership. This clause is intended to give EDJ some protection in the event that HSF becomes unwilling or unable to continue providing its services. HSF, for its part, benefitted by having EDJ as an investor when the software was first being developed. An entity such as CPG was necessary because EDJ could not invest directly in the accounting firm due to state law and ethical considerations governing CPAs. The use of a limited partnership also means that HSF maintains managerial independence and is not subject to control by EDJ in any sense.

Nature of the report provided

The financial report prepared by HSF typically covers the following topics:

1) Analysis of current and projected standard of living needs.
2) Analysis of theoretical life and disability insurance needs, by comparing capital requirements to current and projected resources.
3) Review of individual's current financial position. Classification of assets into general categories such as "Liquid Funds," "Growth & Income Equities," or "Taxable Income Investments."
4) Cash flow projections taking into account expected earnings, income from investments, effect of liabilities or other cash commitments, taxes, and standard of living needs.

   In order to make realistic cash flow projections, it is usually necessary to make some assumptions about future investment patterns. For example, the report might suggest that "Tax-Free Income Investments" might be appropriate based on an individual's cash needs, financial position, expressed risk tolerance, age, and other factors. Specific products are never recommended.
5) A detailed tax analysis is presented. Projected income and deductions are reviewed, and federal, state, and Social Security tax estimates are provided.
6) A general discussion of estate planning concepts is provided, with an emphasis on estate tax planning. The various uses of trusts are discussed in a brief, elementary fashion.
7) The financial assumptions used in the report are set forth, along with an explanation of why they were used.
8) A "glossary" of general investment categories is provided. This is intended to provide an elementary explanation of how basic types of investments "work" in

terms of cash flow, tax effects, marketability, and the degree of risk affecting income or principal.

9) The concept and practical importance of diversification is reviewed.

In summary, the focus of the report is on cash flow and tax considerations. From a practical viewpoint, a client is often interested in having financial projections of this type because he or she expects a change in financial circumstances, such as retirement, the sale of a business, or a large infusion of funds due to inheritance or receipt of insurance proceeds. Other clients simply wish to gain perspective on their situation.

Application of section 202(a)(11)

IAA Release No. 770 suggests three tests for determining whether a person is an "investment advisor" within the meaning of the Act. This determination depends on whether such person "(1) provides advice . . . regarding securities; (2) whether he is in the business of providing such services; and (3) whether he provides such services for compensation." *IAA Release No. 770, 23 SEC Docket 556 at 558.*

It seems clear that HSF "provides advice . . . regarding securities" within the meaning of the Act. The staff interpretation suggests that it does not matter if the advice is generic, and does not refer to specific securities. *IAA Release No. 770, 23 SEC Docket 556 at 558.*

Similarly, it seems clear that HSF receives compensation for this advice. This would be true regardless of the fact that no separate fee is charged for advice regarding securities. *IAA Release No. 770, 23 SEC Docket 556 at 560.*

However, it also appears that HSF is not "in the business" of providing investment advice for compensation. The release suggests that this determination will depend on "(1) whether the investment advice being provided is solely incidental to a non-investment advisory, primary business of the person providing the advice; (2) the specificity of the advice being given; and (3) whether the provider of the advice is receiving, directly or indirectly, any special compensation therefor." *IAA Release No. 770, 23 SEC Docket 556 at 559.* The staff interpretation suggests that an individual would not be engaging in business as an investment advisor if he meets all of these three criteria. Each of these tests must be applied separately in order to determine whether HSF might be "doing business" as an investment advisor.

First of all, it appears that the giving of advice concerning securities is solely incidental to the primary business of HSF. The work of providing "financial planning" reports accounts for less than 15% of the firm's total revenues and, in turn, only a small segment of each report consists of advice concerning securities. Most of the report consists of cash flow projections, financial statements, and tax information—areas that are customarily part of a general accounting practice. Moreover, HSF does not hold itself out to the public as an "investment advisor" or "financial planner." It is identified to the public as an accounting firm. HSF does not attempt to evaluate or predict the performance of securities or of generic categories of securities. Its treatment of securities is limited to pointing out the general categories of securities which are likely to be consistent with a particular individual's cash flow needs and tax situation.

This also relates to the second criterion, the specificity of the advice being given. The "financial planning" reports prepared by HSF never recommend the purchase or sale of specific securities. Certainly matters involving securities will arise in the course of any general accounting practice. We treat those issues in the same manner regardless of whether they arise in the course of doing a tax return, compiling a financial statement, or preparing a "financial plan." This involves pointing out relevant factors such as an individual's cash needs, financial ability to handle risks, and tax considerations, and relating these factors to the characteristics of generic types of securities. It does not

involve an endorsement of any product, type of product, or investment or insurance company.

Third and finally, it is clear that HSF does not receive any special compensation for advice that relates to securities, either direct or indirect. HSF receives a fixed fee for the report it prepares. It does not receive any other economic benefit from any other person in connection with the "financial planning" reports it prepares.

Accordingly, we have concluded that HSF is not "in the business" of providing [advice to] others about securities, or promulgating analyses concerning securities. It follows that section 202(a)(11) of the Act then does not apply to HSF, since the element of being "in business" is not satisfied with respect to either of the two definitions set forth in that section. *IAA Release No. 770, 23 SEC Docket 556 at 558.*

This conclusion is further supported by the exclusion provided in clause (B) of section 202(a)(11). This clause specifies that the definition of an investment advisor does not include "any . . . accountant . . . whose performance of such services is solely incidental to the practice of his profession." The "financial planning" services provided by HSF are not substantially different in any way from the kinds of services that are typically provided by accountants to their individual clients. The only difference might be in the fact that the accountant undertakes a comprehensive financial review, rather than addressing issues piecemeal. The issues addressed are no different from the issues that clients bring up all the time in a general accounting practice.

The fact that HSF does accounting work for an investment advisor (EDJ) does not make HSF into an investment advisor. EDJ does not control the nature of the reports prepared for its advisory clients, or take any part in the accounting business of HSF. CPG, the joint venture between HSF and EDJ, functions only as the owner of software and does not engage in any significant economic activity. The relationship is structured on an "arm's length" basis so that HSF maintains its role as an accounting firm. It does not hold itself out as a securities or investment expert. It does not express any opinion on how securities or categories of securities will perform. It is not compensated for advice about securities and its compensation is not affected by sales of securities.

It further appears that the relationship described does not interfere in any way with the protection of the public that regulation is intended to provide. Edward D. Jones & Co., for its part, remains obligated to register as an investment advisor, to maintain the records required by the Act, and to meet the disclosure requirements of the Act. When a "financial plan" is prepared for an EDJ client, the client receives in advance a disclosure statement and contract that explains what the service includes, and details the background and experience of the individuals at the accounting firm who prepare the report.

Conclusion

Based on the preceding analysis, we believe that HSF is not an "investment advisor" as defined by the Act. The manner in which it delivers accounting services does not alter the non-advisory nature of those services. This conclusion would be different if HSF's relationship with a broker-dealer/investment advisor caused it to be controlled by the advisor; involved expressing an opinion on various products or types of products, making performance predictions about investments, or providing management or account monitoring services or monitor accounts; or involved compensation tied in some way to investment sales or performance. However, we believe that no conditions exist that would cause HSF to be "in the business" of anything but providing accounting services just as we have always provided them.

At the same time, we believe that it would be helpful to obtain a no-action or interpretative position from your office, since IAA Release 770 does not address potential issues

involved in the relationship of a non-advisor with a registered advisor. We would appreciate having your comments on how the law relates to the facts of our situation.

Please contact me if any further information would be helpful to you.

Very truly yours,

Hauk, Soule & Fasani, P.C.
Daniel F. Prebish

Response

Office of the Chief Counsel
Division of Investment Management
Our Ref. No. 86-83-CC
Hauk, Soule & Fasani, P.C.
File No. 132-3

April 20, 1986

In your letter of February 20, 1986, you request a no-action position concerning the investment adviser status of Hauk, Soule & Fasani, P.C. ("HSF") on the grounds that:

1) HSF is not an investment adviser within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940 ("Advisors Act"); and
2) even if HSF is deemed to be within the definition of "investment adviser," it is entitled to rely on the accountant's exception set forth in section 202(a)(11)(B) of the Advisers Act.

With respect to your first argument, we are unable to conclude that HSF falls outside of section 202(a)(11). The fact that the fees HSF earns from reviewing clients' financial situations may not constitute a major or substantial part of HSF's revenues does not, in and of itself, lead to a conclusion that HSF is not "in the business" of providing investment advice. A person's investment advisory business need not constitute his principal business activity or any particular portion of his business activities to come within section 202(a)(11). *See Peter J. Huang (pub. avail. May 18, 1984).*

In the past, we have taken the position that a person whose principal business is providing financial services other than investment advice would not be regarded as being "in the business" of giving investment advice if, as part of his service, he merely discusses in general terms the advisability of securities investments in the context of economic matters or the role of securities in a client's overall financial plan. However, such a person may be deemed to be in the business of providing investment advice if, in other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities. *See, e.g., Investment Advisers Act Rel. No. 770 (Aug. 13, 1981); Donald F. Pooley (pub. avail. Feb. 8, 1985); Suzanne Clark-James (pub. avail. Aug. 30, 1984).* Because HSF may suggest certain investments to a client based on an individual's cash needs, financial position, risk tolerance, and other factors, it is unclear whether HSF would be giving advice or rendering reports or analyses concerning specific securities or specific categories of securities. *See Computer Language Research, Inc. (pub. avail. Dec. 26, 1985).* For this reason, we cannot conclude that HSF does not fall within section 202(a)(11).

With respect to your second argument, while HSF may fall within section 202(a)(11), it would not be required to register as an investment adviser if the services it provides are solely incidental to the practice of accounting. Three factors are relevant to this determination:

1) whether the account (or firm) holds himself out to the public as an investment adviser;
2) whether the advisory services rendered are in connection with and reasonably related to accounting services; and
3) whether the fee charged for advisory services is based on the same factors as those used to determine the accounting fee.

See David R. Markley (pub. avail. Feb. 8, 1985). The exception is not available to an accountant who holds himself out to the public as providing financial planning, pension consulting or other financial advisory services.

With respect to your argument that HSF is excepted from the definition of an investment adviser by section 202(a)(11) (B), we would not recommend any enforcement action to the Commission if HSF, in reliance upon your opinion that the activities of HSF are solely incidental to the practice of the accounting profession under section 202(a)(11) (B), does not register as an investment adviser. This position is based on the facts and representations contained in your letter.

Gerald T. Lins
Attorney

Appendix B

Investment Advisers Act of 1940

Act of August 22, 1940, 54 Stat. 847, 15 U.S. Code, Secs. 80b-1 — 80b-21, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title II — Investment Advisers[1]

Findings

Sec. 201. Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things —

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

Definitions

Sec. 202. (a) When used in this title, unless the context otherwise requires —

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignors' outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the

1. Title I of this Act is the Investment Company Act of 1940.

investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph. [As amended by Act of December 14, 1970, Sec. 23(1), 84 Stat. 1430.]

(3) "Broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title II of the United States Code, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such. [Amended by Act of November 6, 1978, effective October 1, 1979, Sec. 311, Pub. Law 95-598.]

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) "Dealer" means any person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting or trading in securities, or in owning or holding securities, for his own account, either individually or in some fiduciary capacity, but not as part of a regular business.

(8) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker

or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order. [As amended by Act of July 1, 1966, Section 13(j), 80 Stat. 243.]

(12) "Investment company", "affiliated person", and "insurance company" have the same meanings as in the Investment Company Act of 1940. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. [As amended by Act of September 13, 1960, Sec. 1, 74 Stat. 885.]

(13) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934.

(16) "Person" means a natural person or a company.

(17) The term "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules and regulations classify, for the purposes of any portion or portions of this title, persons, including employees controlled by an investment adviser. [As added by Act of December 14, 1970, Sec. 23(2), 84 Stat. 1430.]

(18) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

(19) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Canal Zone, the Virgin Islands, or any other possession of the United States. [As amended by Act of June 25, 1959, Sec. 12(c), 73 Stat. 143; Act of July 12, 1960, Sec. 7(d), 74 Stat. 412; and Act of September 13, 1960, Sec. 1, 74 Stat. 885.]

(20) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or partici-

pates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking: but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(21) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," and "Trust Indenture Act of 1939," mean those Acts, respectively, as heretofore or hereafter amended.

(22) "Business development company" means any company which is a business development company as defined in section 2(a) (48) of title I of this Act and which complies with section 55 of title I of this Act, except that —

(A) the 70 per centum of the value of the total assets condition referred to in sections 2(a) (48) and 55 of title I of this Act shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of title I of this Act; and

(C) the securities which may be purchased pursuant to section 55(a) of title I of this Act may be purchased from any person.

For purposes of this paragraph, all terms in section 2(a) (48) and 55 of title I of this Act shall have the same meaning set forth in such title as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 55 through 65 of title I of this Act shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities and shall be determined no less frequently than annually.

(b) No provision in this title shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Registration of Investment Advisers

Sec. 203. (a) Except as provided in subsection (b), it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) shall not apply to —

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment

company registered under title I of this Act, or a company which has elected to be a business development company pursuant to section 54 of title I of this Act and has not withdrawn its election. For purposes of determining the number of clients of an investment adviser under this paragraph, no shareholder, partner, or beneficial owner of a business development company, as defined in this title, shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner, or beneficial owner.

(c) (1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall —

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it

does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

[As amended by Act of June 4, 1975, Sec. 29(1), 89 Stat. 166-167.]

(d) Any provision of this title (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith. [As added by Act of December 14, 1970, Sec. 24(c), 84 Stat. 1431.]

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated —

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds —

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of sections 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, the

rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if —

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

[Sec. 203(e), as amended by Act of September 13, 1960, Sec. 3(b), 74 Stat. 885; and Act of December 14, 1970, Sec. 24(d), 84 Stat. 1431; amended by Act of June 4, 1975, Sec. 29(2), 89 Stat. 167, 168.]

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

[As added by Act of December 14, 1970, Sec. 24(e), 84 Stat. 1431; amended by Act of June 4, 1975, Sec. 29(3), 89 Stat. 168.]

(g) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (d) of this section, shall deny registration to or revoke or suspend the registration of such successor. [As amended by Act of June 4, 1975, Sec. 29(4), 89 Stat. 169.]

(h) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration of such person. [As amended by Act of September 13, 1960, Sec. 5, 74 Stat. 885; amended by Act of June 4, 1975, Sec. 29(4), 89 Stat. 169.]

Annual and Other Reports

Sec. 204. Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 203(b) of this title), shall make and keep for prescribed periods such records (as defined in section 3(a) (37) of the Securities Exchange Act of 1934), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

[As amended by Act of September 13, 1960, Sec. 6, 74 Stat. 884; amended by Act of June 4, 1975, Sec. 29(5), 89 Stat. 169.]

Investment Advisory Contracts

Sec. 205. No investment adviser, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after the effective date of this title, if such contract —

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

Paragraph (1) of this section shall not (A) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date, (B) apply to an investment advisory contract with —

(i) an investment company registered under title I of this Act, or

(ii) any other person (except a trust, collective trust fund or separate account referred to in section 3(c) (11) of title I of this Act), provided that the contract relates to the investment of assets in excess of $1 million, which contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify. For purposes of clause (B) of the preceding sentence, the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise. As used in paragraphs (2) and (3) of this section, 'investment advisory contract' means any contract or agreement whereby a person agrees to act as investment adviser or to manage any

investment or trading account of another person other than an investment company registered under title I of this Act, or (C) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this title, if (i) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 61(a) (3) (B) (iii) of title I of this Act is satisfied, and (ii) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 61(a) (3) (B) of title I of this Act and does not have a profit-sharing plan described in section 57(n) of title I of this Act.

Prohibited Transactions by Registered Investment Advisers

Sec. 206. It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph (3) shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4), by rules and regulations define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

[Sec. 206, as amended by Act of September 13, 1960, Secs. 8 and 9, 74 Stat. 887.]

Exemptions

Sec. 206A. The Commission, by rules and regulations, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. [As added by Act of December 14, 1970, Sec. 26, 84 Stat. 1433.]

Material Misstatements

Sec. 207. It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

General Prohibitions

Sec. 208. (a) It shall be unlawful for any person registered under section 203 of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

(b) No provision of subsection (a) shall be construed to prohibit a statement that a person is registered under this title or under the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(c) It shall be unlawful for any person registered under section 203 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless

(1) his or its principal business consists of acting as investment adviser, and

(2) a substantial part of his or its business consists of rendering investment supervisory services.

(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder.

[Sec. 208, as amended by Act of September 13, 1960, Sec. 11, 74 Stat. 887.]

Enforcement of Title

Sec. 209. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) For the purposes of any investigation or any proceeding under this title, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall

be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

[Subsection (d) of Sec. 209 was repealed effective December 17, 1970 by Sec. 216 of the Organized Crime Control Act of 1970 (18 U.S. Code).]

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or, in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title. [As amended by Act of September 13, 1960, Sec. 12, 74 Stat. 887.]

Publicity

Sec. 210. (a) The information contained in any registration application or report or amendment thereto filed with the Commission pursuant to any provision of this title shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Photostatic or other copies of information contained in documents filed with the Commission under this title and made available to the public shall be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

(b) Subject to the provisions of subsections (c) and (e) of section 209, the Commission, or any member, officer, or employee thereof, shall not make public the fact that any examination or investigation under this title is being conducted, or the results of or any facts ascertained during any such examination or investigation; and no member, officer, or employee of the Commission shall disclose to any person other than a member, officer, or employee of the Commission any information obtained as a result of any such examination or investigation except with the approval of the Commission. The provisions of this subsection shall not apply —

(1) in the case of any hearing which is public under the provisions of section 212; or

(2) in the case of a resolution or request from either House of Congress.

[Sec. 210 (b), as amended by Act of September 13, 1960, Sec. 13, 74 Stat. 887.]

(c) No provision of this title shall be construed to require, or to authorize the Commission to require any investment adviser engaged in rendering investment supervisory services to disclose the identity, investments, or affairs of any client of such investment adviser, except insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of this title.

Rules, Regulations, and Orders

Sec. 211. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. [As amended by Act of September 13, 1960, Sec. 14, 74 Stat. 887.]

(b) Subject to the provisions of the Federal Register Act and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this title, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

(c) Orders of the Commission under this title shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register. [As amended by Act of June 11, 1960, Sec. 1 (16), 74 Stat. 201.]

(d) No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Hearings

Sec. 212. Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

Court Review of Orders

Sec. 213. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds

for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.[1] [As amended by Act of June 25, 1948, Secs. 1, 32 (a), 62 Stat. 870, 991; Act of May 24, 1949, Sec. 127, 63 Stat. 107; and Act of August 28, 1958, Sec. 26, 72 Stat. 941.]

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Jurisdiction of Offenses and Suits

Sec. 214. The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia," approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

Validity of Contracts

Sec. 215. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

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1. The sections of the Judicial Code referred to in the text have been repealed and are now covered by section 1254 of Title 28, U.S. Code, Judiciary and Judicial Procedure.

Annual Reports of Commission

Sec. 216. The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this title as it may find advisable.

Penalties

Sec. 217. Any person who willfully violates any provision of this title, or any rule, regulation, or order promulgated by the Commission under authority thereof, shall, upon conviction, be fined not more than $10,000, imprisoned for not more than five years, or both. [As amended by Act of September 13, 1969, Sec. 15, 74 Stat. 888; amended by Act of June 4, 1975, Sec. 27 (f), 89 Stat. 163.]

Employees of the Commission

Sec. 218. For the purposes of this title, the Commission may select, employ, and fix the compensation of such attorneys, examiners, and other experts as shall be necessary for the transaction of the business of the Commission in respect of this title without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of the functions of the Commission and fix their salaries in accordance with the Classification Act of 1949, as amended. [As amended by Act of October 28, 1949, Sec. 1106, 63 Stat. 972.]

Separability of Provisions

Sec. 219. If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Short Title

Sec. 220. This title may be cited as the "Investment Advisers Act of 1940."

Effective Date

Sec. 221. This title shall become effective on November 1, 1940.

State Control of Investment Adviser

Sec. 222. Nothing in this title shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. [As added by Act of September 13, 1960, Sec. 16, 74 Stat. 888.]

Appendix C

General Rules and Regulations Under the Investment Advisers Act of 1940

As Amended (Cite as 17CFR 275.0–2)

Rule 0-2. Consent to Service of Process To Be Furnished by Non-Resident Investment Advisers and by Non-Resident General Partners or Managing Agents of Investment Advisers

(a) Each non-resident investment adviser registered or applying for registration pursuant to section 203 of the Investment Advisers Act of 1940, each non-resident general partner of an investment adviser partnership which is registered or applying for registration, and each non-resident managing agent of any other unincorporated investment adviser which is registered or applying for registration, shall furnish to the Commission, in a form prescribed by or acceptable to it, a written irrevocable consent and power of attorney which (1) designates the Securities and Exchange Commission as an agent upon who may be served any process, pleadings, or other papers in any civil suit or action brought in any appropriate court in any place subject to the jurisdiction of the United States, where the cause of action (i) accrues on or after the effective date of this rule, (ii) arises out of any activity, in any place subject to the jurisdiction of the United States, occurring in connection with the conduct of business of an investment adviser, and (iii) is founded, directly or indirectly, upon the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or any rule or regulation under any of said Acts; and (2) stipulates and agrees that any such civil suit or action may be commenced by the service of process upon the Commission and the forwarding of a copy thereof as provided in paragraph (*c*) of this rule, and that the service aforesaid of any such process, pleadings, or other papers upon the Commission shall be taken and held in all courts to be as valid and binding as if due personal service thereof had been made.

(b) The required consent and power of attorney shall be furnished to the Commission within the following period of time:

(1) Each non-resident investment adviser registered at the time this rule becomes effective, and each non-resident general partner or managing agent of an unincorporated investment adviser registered at the time this rule becomes effective, shall furnish such consent and power of attorney within 60 days after such date;

(2) Each investment adviser applying for registration after the effective date of this rule shall furnish, at the time of filing such application, all the consents and powers of attorney required to be furnished by such investment adviser and by each general partner or managing agent thereof: *Provided, however*, That where an application for registration of an investment adviser is pending at the time this rule becomes effective such consents and powers of attorney shall be furnished within 30 days after this rule becomes effective.

(3) Each investment adviser registered or applying for registration who or which becomes a non-resident investment adviser after the effective date of this rule, and each general partner or managing agent, of an unincorporated investment adviser registered or applying for registration, who becomes a non-resident after the effective date of this rule, shall furnish such consent and power of attorney within 30 days thereafter.

(c) Service of any process, pleadings or other papers on the Commission under this rule shall be made by delivering the requisite number of copies thereof to the Secretary of the Commission or to such other person as the Commission may authorize to act in its behalf. Whenever any process, pleadings or other papers as aforesaid are served upon the Commission, it shall promptly forward a copy thereof by registered or certified mail to the appropriate defendants at their last address of record filed with the Commission. The Commission shall be furnished a sufficient number of copies for such purpose, and one copy for its file.

(d) For purposes of this rule the following definitions shall apply:

(1) The term "investment adviser" shall have the meaning set out in section 202 (a) (11) of the Investment Advisers Act of 1940.

(2) The term "managing agent" shall mean any person, including a trustee, who directs or manages or who participates in the directing or managing of the affairs of any unincorporated organization or association which is not a partnership.

(3) The term "non-resident investment adviser" shall mean (A) in the case of an individual, one who resides in or has his principal place of business in any place not subject to the jurisdiction of the United States; (B) in the case of a corporation, one incorporated in or having its principal place of business in any place not subject to the jurisdiction of the United States; (C) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not subject to the jurisdiction of the United States.

(4) A general partner or managing agent of an investment adviser shall be deemed to be a non-resident if he resides in any place not subject to the jurisdiction of the United States.

(Para. (*c*) amended eff. Dec. 4, 1964, Release IA40-179.)

Rule 0-3. References to Rules and Regulations

The term "rules and regulations" refers to all rules and regulations adopted by the Commission pursuant to the Act, including the forms for registration and reports and the accompanying instructions thereto.

(Adopted eff. Mar. 22, 1965, Release IA40-186.)

Rule 0-4. General Requirements of Papers and Applications

(a) Filing of papers. — All papers required to be filed with the Commission shall, unless otherwise provided by the rules and regulations under the Act, be delivered through the mails or otherwise to the Securities and Exchange Commission, Washington, D.C. 20549. Except as otherwise provided by the rules and regulations under the Act, such papers shall be deemed to have been filed with the Securities and Exchange Commission on the date when they are actually received by it.

(b) *Formal specifications respecting applications.* Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed, and every amendment to such application, shall be filed in quintuplicate. One copy shall be signed by the applicant, but the other four copies may have facsimile or typed signatures. Such applications shall be on paper no larger than 8 1/2 x 11 inches in size. To the extent that the reduction of larger documents would render them illegible, those documents may be filed on paper larger than 8 1/2 x 11 inches in size. The left margin should be at least 1 1/2 inches wide and, if the application is bound, it should be bound on the left side. All typewritten or printed matter (including deficits in financial statements) should be set forth in black so as to permit photocopying and microfilming. [Amended in Release No. IA-835, effective January 30, 1983.]

(c) Authorization respecting applications.—

(1) Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed and which is executed by a corporation, partnership, or other company and filed with the Commission, shall contain a concise statement of the applicable provisions of the articles of incorporation, bylaws, or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the same is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions shall be attached as an exhibit to, or the pertinent provisions thereof shall be quoted in, the application.

(2) If an amendment to any such application shall be filed, such amendment shall contain a similar statement or, in lieu thereof, shall state that the authorization described in the original application is applicable to the individual who signs such amendment and that such authorization still remains in effect.

(3) When any such application or amendment is signed by an agent or attorney, the power of attorney evidencing his authority to sign shall contain similar statements and shall be filed with the Commission.

(d) Verification of applications and statements of fact. — Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed and every amendment to such application, and every statement of fact formally filed in support of, or in opposition to, any application or declaration shall be verified by the person executing the same. An instrument executed on behalf of a corporation shall be verified in substantially the following form, but suitable changes may be made in such form for other kinds of companies and for individuals:

STATE OF .....
County of ....., ss:

The undersigned being duly sworn deposes and says that he has duly executed the attached ..... dated ....., 19 ....., for and on behalf of ..... ; that he is the .....
(Name of company) **(Title of officer)**
of such company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

.....
(Signature)

.....
(Type or print name beneath)

Subscribed and sworn to before me a .....
(Title of Officer)

this ..... day of ....., 19.....

[Official Seal] .....

My commission expires .....

(e) Statement of grounds for application. — Each application should contain a brief statement of the reasons why the applicant is deemed to be entitled to the action requested with a reference to the provisions of the Act and of the rules and regulations under which application is made.

(f) Name and address. — Every application shall contain the name and address of each applicant and the name and address of any person to whom any applicant wishes any question regarding the application to be directed.

(g) Proposed Notice. — A proposed notice of the proceeding initiated by the filing of the application shall accompany each application as an exhibit thereto and, if necessary, shall be modified to reflect any amendments to such application.

(h) Definition of Application. — For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

(i) The manually signed original (or in the case of duplicate originals, one duplicate original of all registrations, applications, statements, reports, or other documents filed under the Investment Advisers Act of 1940, as amended, shall be numbered sequentially in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed, or other legible form of notation from the facing page of the document through the last page of that document and any exhibits or attachments thereto. Further, the total number of pages contained in a numbered original shall be

set forth on the first page of the document. [Adopted in Release No. IA-660, effective March 9, 1979, 44 F. R. 4666.]

[Adopted in Release No. IA-532, effective Oct. 21, 1976; amended in Release No. IA-660, effective March 9, 1979; amended in Release No. IA-835, effective January 30, 1983.]

Rule 0-5. Procedure with Respect to Applications and Other Matters

The procedure hereinbelow set forth will be followed with respect to any proceeding initiated by the filing of an application, or upon the Commission's own motion, pursuant to any section of the Act or any rule or regulation thereunder, unless in the particular case a different procedure is provided:

(a) Notice of the initiation of the proceeding will be published in the Federal Register and will indicate the earliest date upon which an order disposing of the matter may be entered. The notice will also provide that any interested person may, within the period of time specified therein, submit to the Commission in writing any facts bearing upon the desirability of a hearing on the matter and may request that a hearing be held, stating his reasons therefor and the nature of his interest in the matter.

(b) An order disposing of the matter will be issued as of course following the expiration of the period of time referred to in paragraph (a), unless the Commission thereafter orders a hearing on the matter.

(c) The Commission will order a hearing on the matter, if it appears that a hearing is necessary or appropriate in the public interest or for the protection of investors, (1) upon the request of any interested person or (2) upon its own motion.

(d) At the time of filing an application under the Act, the applicant or applicants shall pay to the Commission, in the manner specified in paragraph (b) of Rule 203-3 under the Act, a total fee of $150, no part of which shall be refunded. This fee shall not be required where a single application is filed under both the Act and the Investment Company Act of 1940.

(e) Definition of Application. — For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

[Adopted in Release No. IA-532, effective Oct. 21, 1976.]

Rule 0-6. Incorporation by Reference in Applications

(a) Any person filing an application may, subject to the limitations of Rule 201.24 of this chapter, incorporate by reference as an exhibit to such application any document or part thereof, including any financial statement or part thereof, previously or concurrently filed with the Commission pursuant to any act administered by the Commission. The incorporation may be made whether the matter incorporated was filed by such applicant or any other person. If any modification has occurred in the text of any such document since the filing thereof, the applicant shall file with the reference a statement containing the text of any such modification and the date thereof. If the number of copies of any document previously or concurrently filed with the Commission is less than the number required to be filed with the application which incorporates such document, the applicant shall file therewith as many additional copies of the document as may be necessary to meet the requirements of the application.

(b) Notwithstanding paragraph (a) of this rule, a certificate of an independent public accountant or accountants previously or concurrently filed may not be incorporated by

reference in any application unless the written consent of the accountant or accountants to such incorporation is filed with the application.

(c) In each case of incorporation by reference, the matter incorporated shall be clearly identified in the reference. An express statement shall be made to the effect that the specified matter is incorporated in the application at the particular place where the information is required.

(d) Notwithstanding paragraph (a) of this rule, no application shall incorporate by reference any exhibit or financial statement which (1) has been withdrawn, or (2) was filed under any act administered by the Commission in connection with a registration which has ceased to be effective, or (3) is contained in an application for registration, registration statement, or report subject, at the time of the incorporation by reference, to pending proceedings under Section 8(b) or 8(d) of the Securities Act of 1933, Section 8(e) of the Investment Company Act of 1940, Section 15(b) (4) (A) of the Securities Exchange Act of 1934, Section 203(e) (1) of the Act, or to an order entered under any of those Sections.

(e) Notwithstanding paragraph (a) of this rule, the Commission may refuse to permit incorporation by reference in any case in which in its judgment such incorporation would render an application incomplete, unclear, or confusing.

(f) Definition of Application. — For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

Note: Prior to incorporating by reference any document as an exhibit to an application, applicants are advised to review Rule 201.24 of this chapter as in effect at the time the application is filed to determine whether such incorporation by reference would be permissible under that rule.

[Adopted in Release No. IA-532, effective Oct. 21, 1976.]

Rule 0-7. Small Entities for Purposes of the Regulatory Flexibility Act

(a) For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act [5 U. S. C. Rule 601 *et seq.*], and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization" for purposes of the Investment Advisers Act of 1940 shall mean an investment adviser that:

(1) Manages assets with a total value of $50 million or less, in discretionary or non-discretionary accounts, as of the end of its most recent fiscal year and does not render other advisory services; or

(2) Solely, or in addition to managing assets of $50 million or less, renders other advisory services, and the assets related to its advisory business do not exceed in value $50,000 as of the end of its most recent fiscal year.

(b) As used in this rule, the term "other advisory services" means the services referred to in Form ADV, Part II, Item 1A (3)-(9). [Amended in Release No. IA-991, effective January 1, 1986.]

Rule 203-1. Application for Registration of Investment Adviser

(a) An application for registration of an investment adviser filed pursuant to section 203(c) or 203(f) of the Act shall be filed on Form ADV in accordance with the instructions contained therein.

(b) A Form ADV filed by an investment adviser partnership which is not registered when such form is filed and which succeeds to and continues the business of a predecessor partnership registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if it is filed to reflect the changes in the partnership and to furnish required information concerning any new partners.

(c) A Form ADV filed by an investment adviser corporation which is not registered when such form is filed and which succeeds to and continues the business of a predecessor corporation registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if the succession is based solely on a change in the predecessor's state of incorporation and the amendment is filed to reflect that change. (Added in Release No. IA-805, effective May 25, 1982.)

(d) A Form ADV filed by an investment adviser corporation, partnership, sole proprietorship or other entity which is not registered when such form is filed and which succeeds to and continues the business of a predecessor corporation, partnership, sole proprietorship or other entity registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if the succession is based solely on a change in the predecessor's form of organization and the amendment is filed to reflect that change. (Added in Release No. IA-805, effective May 25, 1982.)

Rule 203-2. Withdrawal from Registration

(a) Notice of withdrawal from registration as an investment adviser pursuant to Section 203(h) shall be filed on Form ADV-W in accordance with the instructions contained therein.

(b) Except as hereinafter provided, a notice to withdraw from registration filed by an investment adviser pursuant to Section 203(h) shall become effective on the 60th day after the filing thereof with the Commission or within such shorter period of time as the Commission may determine. If, prior to the effective date of a notice of withdrawal from registration, the Commission has instituted a proceeding pursuant to Section 203(e) to suspend or revoke registration, or a proceeding pursuant to Section 203(h) to impose terms or conditions upon withdrawal, the notice of withdrawal shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(c) Every notice of withdrawal filed pursuant to this rule shall constitute a "report" within the meaning of Sections 204 and 207 and other applicable provisions of the Act.

Rule 203-3. Fees for Registration and Applicants

(a) At the time of filing by an investment adviser of an application for registration under the Act, the applicant shall pay to the Commission a fee of $150, no part of which shall be refunded.

(b) All payments of fees shall be made in cash, certified check, personal check or by United States Postal Money Orders, bank cashier's check or bank money order payable to the Securities and Exchange Commission, omitting the name or title of officials of the Commission. Payment of fees required by this section shall be made in accordance with the directions set forth in Rule 203.3a of this chapter. [Amended in Release No. IA-915, effective August 2, 1984.]

Rule 204-1. Amendments to Application for Registration

(a) (1) Every investment adviser whose registration is effective on January 1, 1986 shall file as an amendment to the application a complete Form ADV (revised as of January 1, 1986) not later than March 31, 1986. An adviser filing an amendment under this paragraph need not file Form ADV-S, or any amendment required by paragraph (b) (2) of Rule 204-1, required to be filed between January 1, 1986 and December 31, 1986.

(a) (2) Every investment adviser whose registration is pending on January 1, 1986 shall promptly file as an amendment to the application a complete Form ADV (Rule 279.1 of this chapter as revised as of January 1, 1986), prior to its registration becoming effective, unless it shall have prior thereto so amended its application.

(b) (1) If the information contained in the response to Items 1, 2, 3, 4, 5, 8, 11, 13A, 13B, 14A and 14B of Part I of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate for any reason or if the information contained in response to any question in Items 9 and 10 and all of Part II (except Item 14) of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate in a material manner, the investment adviser shall promptly file an amendment on Form ADV correcting such information.

(b) (2) For all other changes not designated in paragraph (b) (1) of this section, the investment adviser shall file an amendment on Form ADV correcting such information within 90 days of the end of the fiscal year. In addition, a balance sheet as required by Item 14 of Part II shall be filed within 90 days of the end of the applicant's fiscal year.

(c) Every investment adviser whose registration is effective on the last day of its fiscal year shall file a Form ADV-S within 90 days of the end of its fiscal year unless its registration has been withdrawn, cancelled or revoked prior to that date.

(d) Every document required pursuant to this rule shall constitute a "report" within the meaning of Sections 204 and 207 of the Act.

[Amended in Release No. IA-991, effective January 1, 1986.]

Rule 204-2. Books and Records to Be Maintained by Investment Advisers

(a) Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to Section 203(b) of the Act) shall make and keep true, accurate and current the following books and records relating to his investment advisory business:

(1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.

(2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. Such memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recom-

mended the transaction to the client and the person who placed such order; and shall show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

(4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.

(5) All bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser as such.

(6) All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

(7) Originals of all written communications received and copies of all written communications sent by such investment adviser relating to (A) any recommendation made or proposed to be made and any advice given or proposed to be given, (B) any receipt, disbursement or delivery of funds or securities, or (C) the placing or execution of any order to purchase or sell any security; *provided, however*, (i) that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof.

(8) A list or other record of all accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client.

(9) All powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser, or copies thereof.

(10) All written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such.

(11) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommending the purchase or sale of a specific security, which the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than investment supervisory clients or persons connected with such investment adviser), and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor.

(12) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. Such record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or

bank with or through whom the transaction was effected. Such record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

For purposes of this paragraph —

(A) The term "advisory representative" shall mean any partner, officer or director of the investment adviser; any employee who makes any recommendation, who participates in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which recommendation shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of such recommendations or of the information concerning such recommendations; and any of the following persons who obtain information concerning securities recommendations being made by such investment adviser prior to the effective dissemination of such recommendations or of the information concerning such recommendations: (i) any person in a control relationship to the investment adviser, (ii) any affiliated person of such controlling person and (iii) any affiliated person of such affiliated person.

(B) "Control" shall have the same meaning as that set forth in Section 2(a) (9) of the Investment Company Act of 1940, as amended.

An investment adviser shall not be deemed to have violated the provisions of subparagraph (12) because of his failure to record securities transactions of any advisory representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded. [Subparagraph (12) as adopted by Release No. IA-203, effective October 1, 1966, 31 F. R. 10921; amended Release No. IA-436, effective March 31, 1975, 40 F. R. 8548.]

(13) Notwithstanding the provisions of subparagraph (12) above, where the investment adviser is primarily engaged in a business or businesses other than advising registered investment companies or other advisory clients, a record must be maintained of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. Such record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. Such record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

For purposes of this paragraph —

(A) The term "advisory representative," when used in connection with a company primarily engaged in a business or businesses other than advising registered investment companies or other advisory clients, shall mean any partner, officer, director or employee of the investment adviser who makes any recommendation, who participates in the determination of which recommendation shall be made, or whose functions or

duties relate to the determination of which recommendation shall be made, or who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of such recommendations or of the information concerning such recommendations; and any of the following persons who obtain information concerning securities recommendations being made by such investment adviser prior to the effective dissemination of such recommendations or of the information concerning such recommendations: (i) any person in a control relationship to the investment adviser, (ii) any affiliated person of such controlling person and (iii) any affiliated person of such affiliated person.

(B) "Control" shall have the same meaning as that set forth in Section 2(a) (9) of the Investment Company Act of 1940, as amended.

(C) An investment adviser is "primarily engaged in a business or businesses other than advising registered investment companies or other advisory clients" when, for each of its most recent three fiscal years or for the period of time since organization, whichever is lesser, the investment adviser derived, on an unconsolidated basis, more than 50% of (1) its total sales and revenues, and (2) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.

An investment adviser shall not be deemed to have violated the provisions of this subparagraph (13) because of his failure to record securities transactions of any advisory representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded. [Subparagraph (13) as adopted in Release No. IA-436, effective March 31, 1975, 40 F. R. 8548.]

(14) A copy of each written statement and each amendment or revision thereof, given or sent to any client or prospective client of such investment adviser in accordance with the provisions of Rule 204-3 under the Act, and a record of the dates that each written statement, and each amendment or revision thereof, was given, or offered to be given, to any client or prospective client who subsequently becomes a client. [Adopted in Release No. IA-664, effective July 31, 1979, 44 F. R. 21008.]

(15) All written acknowledgments of receipt obtained from clients pursuant to Rule 206(4)-3(a) (2) (iii) (B) of this chapter and copies of the disclosure documents delivered to clients by solicitors pursuant to Rule 206(4)-3 of this chapter. [Adopted in Release No. IA-688, effective September 30, 1979, 44 F. R. 42130.]

(b) If an investment adviser subject to paragraph (a) of this rule has custody or possession of securities or funds of any client, the records required to be made and kept under paragraph (a) above shall include:

(1) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and all other debits and credits to such accounts.

(2) A separate ledger account for each such client showing all purchases, sales, receipts and deliveries of securities, the date and price of each such purchase and sale, and all debits and credits.

(3) Copies of confirmations of all transactions effected by or for the account of any such client.

(4) A record for each security in which any such client has a position, which record shall show the name of each such client having any interest in each security, the amount or interest of each such client, and the location of each such security.

(c) Every investment adviser subject to paragraph (a) of this rule who renders any investment supervisory or management service to any client shall, with respect to the

portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(1) Records showing separately for each such client the securities purchased and sold, and the date, amount and price of each such purchase and sale.

(2) For each security in which any such client has a current position, information from which the investment adviser can promptly furnish the name of each such client, and the current amount or interest of such client.

(d) Any books or records required by this rule may be maintained by the investment adviser in such manner that the identity of any client to whom such investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

(e) (1) All books and records required to be made under the provisions of paragraphs (a) to (c) (1), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

(2) Partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.

(f) An investment adviser subject to paragraph (a) of this rule, before ceasing to conduct or discontinuing business as an investment adviser, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this rule for the remainder of the period specified in this rule, and shall notify the Commission in writing, at its principal office, Washington 25, D.C., of the exact address where such books and records will be maintained during such period.

(g) (1) The records required to be maintained and preserved pursuant to this rule may be immediately produced or reproduced by photograph on film or, as provided in paragraph (g) (2) below, on magnetic disk, tape or other computer storage medium, and be maintained and preserved for the required time in that form. If records are produced or reproduced by photographic film or computer storage medium, the investment adviser shall: [Amended in Release No. IA-952, effective January 17, 1985, 50 F. R. 2542.]

(i) arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record, [Amended in Release No. IA-952, effective January 17, 1985, 50 F. R. 2542.]

(ii) be ready at all times to provide, and promptly provide, any facsimile enlargement of film or computer printout or copy of the computer storage medium which the Commission by its examiners or other representatives may request, [Amended in Release No. IA-952, effective January 17, 1985, 50 F.R. 2542.]

(iii) store separately from the original one other copy of the film or computer storage medium for the time required, [Amended in Release No. IA-952, effective January 17, 1985, 50 F. R. 2542.]

(iv) with respect to records stored on computer storage medium, maintain procedures for maintenance and preservation of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction, and [Amended in Release No. IA-952, effective January 17, 1985, 50 F. R. 2542.]

(v) with respect to records stored on photographic film, at all times have available for Commission examination of its records pursuant to section 204 of the Investment

Advisers Act of 1940, facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements. [Amended in Release No. IA-952, effective January 17, 1985, 50 F.R. 2542.]

(2) Pursuant to paragraph (g) (1) an adviser may maintain and preserve on computer tape or disk or other computer storage medium records which, in the ordinary course of the adviser's business, are created by the adviser on electronic media or are received by the adviser solely on electronic media or by electronic data transmission. [Amended in Release No. IA-952, effective January 17, 1985, 50 F. R. 2542.]

(h) (1) Any book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 [17 CFR 240.17a-3] and 17a-4 [17 CFR 240.17a-4] under the Securities Exchange Act of 1934, which is substantially the same as the book or other record required to be made, kept, maintained and preserved under this rule, shall be deemed to be made, kept, maintained and preserved in compliance with this rule.

(2) A record made and kept pursuant to any provision of paragraph (a) of this rule, which contains all the information required under any other provision of paragraph (a), need not be maintained in duplicate in order to meet the requirements of the other provision of paragraph (a) of the rule.

(i) As used in this rule the term "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is [not] to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

(j) (1) Except as provided in paragraph (j) (3) hereof, each non-resident investment adviser registered or applying for registration pursuant to Section 203 of the Act shall keep, maintain and preserve, at a place within the United States designated in a notice from him as provided in paragraph (j) (2) hereof, true, correct, complete and current copies of books and records which he is required to make, keep current, maintain or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act.

(2) Except as provided in paragraph (j) (3) hereof, each non-resident investment adviser subject to this paragraph (j) shall furnish to the Commission a written notice specifying the address of the place within the United States where the copies of the books and records required to be kept and preserved by him pursuant to paragraph (j) (1) hereof are located. Each non-resident broker or dealer registered or applying for registration when this paragraph becomes effective shall file such notice within 30 days after such rule becomes effective. Each non-resident investment adviser who files an application for registration after this paragraph becomes effective shall file such notice with such application for registration.

(3) Notwithstanding the provisions of paragraphs (j) (1) and (j) (2) hereof, a non-resident investment adviser need not keep or preserve within the United States copies of the books and records referred to in said paragraphs (j) (1) and (j) (2), if:

(i) Such non-resident investment adviser files with the Commission, at the time or within the period provided by paragraph (j) (2) hereof, a written undertaking, in form acceptable to the Commission and signed by a duly authorized person, to furnish to the Commission, upon demand, at its principal office in Washington, D.C., or at any Regional Office of the Commission designated in such demand, true, correct, complete and current copies of any or all of the books and records which he is required to make, keep current, maintain, or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in such demand. Such undertaking shall be in substantially the following form:

The undersigned hereby undertakes to furnish at its own expense to the Securities

and Exchange Commission at its principal office in Washington, D. C., or at any Regional Office of said Commission specified in a demand for copies of books and records made by or on behalf of said Commission, true, correct, complete, and current copies of any or all, or any part, of the books and records which the undersigned is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Securities and Exchange Commission under the Investment Advisers Act of 1940. This undertaking shall be suspended during any period when the undersigned is making, keeping current, and preserving copies of all said books and records at a place within the United States in compliance with Rule 204-2(j) under the Investment Advisers Act of 1940. This undertaking shall be binding upon the undersigned and the heirs, successors and assigns of the undersigned, and the written irrevocable consents and powers of attorney of the undersigned, its general partners and managing agents filed with the Securities and Exchange Commission shall extend to and cover any action to enforce same.

and

(ii) Such non-resident investment adviser furnishes to the Commission, at his own expense 14 days after written demand therefor forwarded to him by registered mail at his last address of record filed with the Commission and signed by the Secretary of the Commission or such other person as the Commission may authorize to act in its behalf, true, correct, complete and current copies of any or all books and records which such investment adviser is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in said written demand. Such copies shall be furnished to the Commission at its principal office in Washington, D. C., or at any Regional Office of the Commission which may be specified in said written demand.

(4) For purposes of this rule the term "non-resident investment adviser" shall have the meaning set out in Rule 0-2(d) (3) under the Act.

[Adopted in Release No. IA-114, July 1, 1961; amended by Release No. IA-203, effective October 1, 1966; amended by Release No. IA-436, effective March 31, 1975; amended by Release No. IA-477, effective October 31, 1975; amended by Release No. IA-664, effective July 31, 1979; amended by Release No. IA-688, effective September 30, 1979; amended in Release No. IA-952, effective January 17, 1985.]

Rule 204-3. Written Disclosure Statements

(a) *General requirement.* Unless otherwise provided in this rule, an investment adviser, registered or required to be registered pursuant to Section 203 of the Act, shall, in accordance with the provisions of this section, furnish each advisory client and prospective advisory client with a written disclosure statement which may be either a copy of Part II of its Form ADV which complies with Rule 204-1(b) under the Act or a written document containing at least the information then so required by Part II of Form ADV.

(b) *Delivery.* (1) An investment adviser, except as provided in paragraph (2), shall deliver the statement required by this section to an advisory client or prospective advisory client (i) not less than 48 hours prior to entering into any written or oral investment advisory contract with such client or prospective client, or (ii) at the time of entering into any such contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

(2) Delivery of the statement required by paragraph (1) need not be made in connection with entering into (i) an investment company contract or (ii) a contract for impersonal advisory services.

(c) *Offer to deliver.* (1) An investment adviser, except as provided in paragraph (2), annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by this section.

(2) The delivery or offer required by paragraph (1) need not be made to advisory clients receiving advisory services solely pursuant to (i) an investment company contract or (ii) a contract for impersonal advisory services requiring a payment of less than $200;

(3) With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services which requires a payment of $200 or more, an offer of the type specified in paragraph (1) shall also be made at the time of entering into an advisory contract.

(4) Any statement requested in writing by an advisory client pursuant to an offer required by this paragraph must be mailed or delivered within seven days of the receipt of the request.

(d) *Omission of inapplicable information.* If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by Part II of Form ADV may be omitted from the statement furnished to an advisory client or prospective advisory client if such information is applicable only to a type of investment advisory service or fee which is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client. [Amended in Release No. IA-805, effective May 25, 1982.]

(e) *Other disclosures.* Nothing in this rule shall relieve any investment advisor from any obligation pursuant to any provision of the Act or the rules and regulations thereunder or other federal or state law to disclose any information to its advisory clients or prospective advisory clients not specifically required by this rule.

(f) *Definitions.* For the purpose of this rule: (1) "contract for impersonal advisory services" means any contract relating solely to the provision of investment advisory services (i) by means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (ii) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or (iii) any combination of the foregoing services.

(2) "entering into," in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to such extension or renewal.

(3) "investment company contract" means a contract with an investment company registered under the Investment Company Act of 1940 which meets the requirements of Section 15(c) of that Act.

[Adopted in Release No. IA-664, effective July 31, 1979; amended in Release No. IA-805, effective May 25, 1982.]

Rule 205-1. Definition of "Investment Performance" of an Investment Company and "Investment Record" of an Appropriate Index of Securities Prices

(a) "Investment performance" of an investment company for any period shall mean the sum of:

(1) the change in its net asset value per share during such period; and

(2) the value of its cash distributions per share accumulated to the end of such period;

(3) the value of capital gains taxes per share paid or payable on undistributed realized long-term capital gains accumulated to the end of such period;

expressed as a percentage of its net asset value per share at the beginning of such period. For this purpose, the value of distributions per share of realized capital gains, of dividends per share paid from investment income and of capital gains taxes per share paid or payable on undistributed realized long-term capital gains shall be treated as reinvested in shares of the investment company at the net asset value per share in effect at the close of business on the record date for the payment of such distributions and dividends and the date on which provision is made for such taxes, after giving effect to such distributions, dividends and taxes.

(b) "Investment record" of an appropriate index of securities prices for any period shall mean the sum of:

(1) the change in the level of the index during such period; and

(2) the value, computed consistently with the index, of cash distributions made by companies whose securities comprise the index accumulated to the end of such period;

expressed as a percentage of the index level at the beginning of such period. For this purpose cash distributions on the securities which comprise the index shall be treated as reinvested in the index at least as frequently as the end of each calendar quarter following the payment of the dividend.

[Adopted in Release No. IA-327, effective September 1, 1973 or, as to any particular investment company, within 60 days of its first regular annual shareholder meeting held on or after September 30, 1972, whichever is sooner.]

Rule 205-2. Definition of "Specified Period" over which the Asset Value of the Company or Fund under Management is Averaged

(a) For purposes of this rule:

(1) "Fulcrum fee" shall mean the fee which is paid or earned when the investment company's performance is equivalent to that of the index or other measure of performance.

(2) "Rolling period" shall mean a period consisting of a specified number of subperiods of definite length in which the most recent subperiod is substituted for the earliest subperiod as time passes.

(b) The specified period over which the asset value of the company or fund under management is averaged shall mean the period over which the investment performance of the company or fund and the investment record of an appropriate index of securities prices or such other measure of investment performance are computed.

(c) Notwithstanding paragraph (b), the specified period over which the asset value of the company or fund is averaged for the purpose of computing the fulcrum fee may differ from the period over which the asset value is averaged for computing the performance related portion of the fee, only if

(1) the performance related portion of the fee is computed over a rolling period and the total fee is payable at the end of each subperiod of the rolling period; and

(2) the fulcrum fee is computed on the basis of the asset value averaged over the most recent subperiod or subperiods of the rolling period.

[Adopted in Release No. IC-7484 and Release No. IA-347, effective December 1, 1973, or, with respect to any particular investment company, within 60 days after its next regular meeting held after December 1, 1972, whichever is sooner.]

Rule 205-3. Conditional Exemption from the Compensation Prohibition of Section 205(1) for Registered Investment Advisers

(a) *General.* The provisions of section 205(1) of the Act shall not prohibit any registered investment adviser from entering into, performing, renewing or extending an investment advisory contract which provides for compensation to the investment adviser on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client, *Provided,* That all the conditions in this rule are satisfied.

(b) *Nature of the client.* (1) The client entering into the contract subject to this rule must be a natural person or a company, as defined in paragraphs (b) (2) and (g) (1) of this rule, who immediately after entering into the contract has at least $500,000 under the management of the investment adviser; or (ii) a person whom the registered investment adviser (and any person acting on his behalf) entering into the contract reasonably believes, immediately prior to entering into the contract, is a natural person or a company, as defined in paragraphs (b) (2) and (g) (1) of this rule, whose net worth at the time the contract is entered into exceeds $1,000,000. (The net worth of a natural person may include assets held jointly with such person's spouse.)

(2) The term "company" as used in paragraph (b) (1) does not include (i) a private investment company, as defined in paragraph (g) (2) of this rule, (ii) an investment company registered under the Investment Company Act of 1940 or (iii) a business development company, as defined in section 202(a) (22) of the Investment Advisers Act of 1940, unless each of the equity owners (other than the investment adviser entering into a contract under the rule) of any such company is a natural person or company described in this paragraph (b).

(c) *Compensation formula.* The compensation paid to the adviser under this rule with respect to the performance of any securities over a given period shall be based on a formula which:

(1) Includes, in the case of securities for which market quotations are readily available, the realized capital losses and unrealized capital depreciation of the securities over the period;

(2) Includes, in the case of securities for which market quotations are not readily available, (i) the realized capital losses of securities over the period; and (ii) if the unrealized capital appreciation of the securities over the period is included, the unrealized capital depreciation of the securities over the period; and

(3) Provides that any compensation paid to the adviser under this rule is based on the gains less the losses (computed in accordance with paragraphs (c) (1) and (2)) in the client's account for a period of not less than one year.

(d) *Disclosure.* In addition to the requirements of Form ADV, the adviser shall disclose to the client, or the client's independent agent, prior to entering into an advisory contract under this rule, all material information concerning the proposed advisory arrangement including the following:

(1) That the fee arrangement may create an incentive for the adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;

(2) Where relevant, that the adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;

(3) The periods which will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

(4) The nature of any index which will be used as a comparative measure of investment performance, the significance of the index, and the reason the adviser believes the index is appropriate; and

(5) Where an adviser's compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available, how the securities will be valued and the extent to which the valuation will be independently determined.

(e) *Arms-Length Contract.* The investment adviser (and any person acting on its behalf) who enters into the contract must reasonably believe, immediately prior to entering into the contract, that the contract represents an arm's-length arrangement between the parties and that the client (or in the case of a client which is a company as defined in paragraph (g) (1), the person representing the company), alone or together with the client's independent agent, understands the proposed method of compensation and its risks. The representative of a company may be a partner, director, officer or an employee of the company or the trustee, where the company is a trust, or any other person designated by the company or trustee, but must satisfy the definition of client's independent agent set forth in paragraph (g) (4).

(f) *Transition rule.* (1) The proviso of paragraph (a) and paragraphs (b), (c) and (e) of this rule do not apply to any advisory contract (or renewal or extension thereof) between an investment adviser and a client where (i) the contract was entered into prior to and continued in force after November 14, 1985; and (ii) the adviser, at the time the contract was entered into, was not registered or required to be registered as an investment adviser under the Act; provided, however, that all provisions of this rule shall apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract after the effective date of this rule.

(2) Notwithstanding paragraph (f)(1), the renewal or extension of a contract described therein will be subject to paragraph (e).

(g) *Definitions.* For the purposes of this rule:

(1) The term "company" has the same meaning as in section 202(a) (5) of the Act, but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

(2) The term "private investment company" means a company which would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 but for the exception provided from that definition by section 3(c) (1) of such Act.

(3) The term "affiliate" has the same meaning as in section 2(a) (3) of the Investment Company Act.

(4) The term "client's independent agent" means any person agreeing to act as the client's agent in connection with the contract other than:

(i) The investment adviser acting in reliance upon this rule, an affiliated person of the investment adviser, an affiliated person of an affiliated person of the investment adviser, or an interested person of the investment adviser as defined in paragraph (g) (5);

(ii) A person who receives, directly or indirectly, any compensation in connection with the contract from the investment adviser, an affiliated person of the investment adviser, an affiliated person of an affiliated person of the investment adviser or an interested person of the investment adviser as defined in paragraph (g) (5); or

(iii) A person with any material relationship between himself (or an affiliated person of such person) and the investment adviser (or an affiliated person of the investment adviser) that exists, or has existed at any time during the previous two years.

(5) The term "interested person" as used in paragraph (g) (4) means:

(i) Any member of the immediate family of any natural person who is an affiliated person of the investment adviser;

(ii) Any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued by the investment adviser or by a controlling person of the investment adviser if the beneficial or legal interest of the person in any security issued by the investment adviser or by a controlling person of the investment adviser (A) exceeds one tenth of one percent of any class of outstanding securities of the investment adviser or a controlling person of the investment adviser; or (B) exceeds 5% of the total assets of the person (seeking to act as the client's independent agent).

(iii) Any person or partner or employee of any person who at any time since the beginning of the last two years has acted as legal counsel for the investment adviser.

(6) (i) The term "securities for which market quotations are readily available" in paragraph (c) has the same meaning as in Rule 2a-4(a) (1) under the Investment Company Act of 1940.

(ii) The term "securities for which market quotations are not readily available" in paragraph (c) means securities not described in paragraph (g) (6) (i) of this rule.

(h) An investment adviser entering into or performing an investment advisory contract under this rule is not relieved of any obligations under section 206 of the Advisers Act or of any other applicable provisions of the federal securities laws.

(i) Nothing in this rule relieves a client's independent agent from any obligations to the client under applicable law.

[Adopted in Release No. IA-996, November 14, 1985, effective upon publication in *Federal Register.*]

Rule 206(3)-1. Exemption of Investment Advisers Registered as Broker-Dealers in Connection with the Provision of Certain Investment Advisory Services

(a) An investment adviser which is a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934 shall be exempt from Section 206(3) in connection with any transaction in relation to which such broker or dealer is acting as an investment adviser solely (1) by means of publicly distributed written materials or publicly made oral statements; (2) by means of written materials or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (3) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or (4) any combination of the foregoing services: *Provided,* however, that such materials and oral statements include a statement that if the purchaser of the advisory communication uses the services of the adviser in connection with a sale or purchase of a security which is a subject of such communication, the adviser may act as principal for its own account or as agent for another person.

(b) For the purpose of this Rule, publicly distributed written materials are those which are distributed to 35 or more persons who pay for such materials, and publicly made oral statements are those made simultaneously to 35 or more persons who pay for access to such statements.

Note: The requirement that the investment adviser disclose that it may act as principal or agent for another person in the sale or purchase of a security that is the

subject of investment advice does not relieve the investment adviser of any disclosure obligation which, depending upon the nature of the relationship between the investment adviser and the client, may be imposed by subparagraphs (1) or (2) of Section 206 or the other provisions of the federal securities laws.

[As adopted in Release No. IA-470, August 20, 1975.]

Rule 206(3)-2. Agency Cross Transactions for Advisory Clients

(a) An investment adviser registered under section 203 of the Act (15 U.S.C. 80b-3), or a person registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and controlling, controlled by or under common control with an investment adviser registered under section 203 of the Act, shall be deemed in compliance with the provisions of section 206(3) of the Act (15 U.S.C. 80b-6(3)) in effecting an agency cross transaction for an advisory client, if:

(1) The advisory client has executed a written consent prospectively authorizing the investment adviser, or any other person relying on this rule, to effect agency cross transactions for such advisory client, provided that such written consent is obtained after full written disclosure that with respect to agency cross transactions the investment adviser or such other person will act as broker for, receive commissions from, and have a potentially conflicting division of loyalties and responsibilities regarding, both parties to such transactions;

(2) The investment adviser, or any other person relying on this rule, sends to each such client a written confirmation at or before the completion of each such transaction, which confirmation includes (i) a statement of the nature of such transaction, (ii) the date such transaction took place, (iii) an offer to furnish upon request, the time when such transaction took place, and (iv) the source and amount of any other remuneration received or to be received by the investment adviser and any other person relying on this rule in connection with the transaction, *Provided, however,* That if, in the case of a purchase, neither the investment adviser nor any other person relying on this rule was participating in a distribution, or in the case of a sale, neither the investment adviser nor any other person relying on this rule was participating in a tender offer, the written confirmation may state whether any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer;

(3) The investment adviser, or any other person relying on this rule, sends to each client, at least annually, and with or as part of any written statement or summary of such account from the investment adviser or such other person, a written disclosure statement identifying the total number of such transactions during the period since the date of the last such statement or summary, and the total amount of all commissions or other remuneration received or to be received by the investment adviser or any other person relying on this rule in connection with such transactions during such period;

(4) Each written disclosure and confirmation required by this rule includes a conspicuous statement that the written consent referred to in paragraph (a) (1) of this section may be revoked at any time by written notice to the investment adviser, or to any other person relying on this rule, from the advisory client; and

(5) No such transaction is effected in which the same investment adviser or an investment adviser and any person controlling, controlled by or under common control with such investment adviser recommended the transaction to both any seller and any purchaser.

[Paragraph (a) amended in Release No. IA-881, effective September 15, 1983.]

(b) For purposes of this rule the term "agency cross transaction for an advisory client" shall mean a transaction in which a person acts as an investment adviser in relation to a transaction in which such investment adviser, or any person controlling, controlled by or under common control with such investment adviser, acts as broker for both such advisory client and for another person on the other side of the transaction.

(c) This rule shall not be construed as relieving in any way the investment adviser or another person relying on this rule from acting in the best interests of the advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for the advisory client; nor shall it relieve such person or persons from any disclosure obligation which may be imposed by subparagraphs (1) or (2) of Section 206 of the Act or by other applicable provisions of the federal securities laws.

[Adopted in Release No. IA-589, June 1, 1977, amended in Release No. IA-881, effective September 15, 1983.]

Rule 206(4)-1. Advertisements by Investment Advisers

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:

(1) which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

(2) which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: *Provided, however,* That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than 1 year if such advertisement, and such list if it is furnished separately: (A) state the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (B) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

(3) which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(4) which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(5) which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(b) For the purposes of this rule the term "advertisement" shall include any notice, circular, letter or other written communication addressed to more than one person, or

any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

Rule 206(4)-2. Custody or Possession of Funds or Securities of Clients

(a) It shall constitute a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of section 206(4) of the Act for any investment adviser who has custody or possession of any funds or securities in which any client has any beneficial interest, to do any act or take any action, directly or indirectly, with respect to any such funds or securities, unless:

(1) all such securities of each such client are segregated, marked to identify the particular client who has the beneficial interest therein, and held in safekeeping in some place reasonably free from risk of destruction or other loss; and

(2) (A) all such funds of such clients are deposited in one or more bank accounts which contain only clients' funds, (B) such account or accounts are maintained in the name of the investment adviser as agent or trustee for such clients, and (C) the investment adviser maintains a separate record for each such account which shows the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account; and the exact amount of each client's beneficial interest in such account; and

(3) such investment adviser, immediately after accepting custody or possession of such funds or securities from any client, notifies such client in writing of the place and manner in which such funds and securities will be maintained, and thereafter, if and when there is any change in the place or manner in which such funds or securities are being maintained, gives each such client written notice thereof; and

(4) such investment adviser sends to each client, not less frequently than once every 3 months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account during such period; and

(5) all such funds and securities of clients are verified by actual examination at least once during each calendar year by an independent public accountant at a time which shall be chosen by such accountant without prior notice to the investment adviser. A certificate of such accountant stating that he has made an examination of such funds and securities, and describing the nature and extent of such examination, shall be filed with the Commission promptly after each such examination.

(b) This rule shall not apply to an investment adviser also registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 if (1) such broker-dealer is subject to and in compliance with Rule 15c3-1 under the Securities Exchange Act of 1934, or (2) such broker-dealer is a member of an exchange whose members are exempt from Rule15c3-1 under the provisions of paragraph (b) (2) thereof, and such broker-dealer is in compliance with all rules and settled practices of such exchange imposing requirements with respect to financial responsibility and the segregation of funds or securities carried for the account of customers.

Rule 206(4)-3. Cash Payments for Client Solicitations

(a) It shall be unlawful for any investment adviser required to be registered pursuant to Section 203 of the Act to pay a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless:

(1) (i) the investment adviser is registered under the Act;

(ii) the solicitor is not a person (A) subject to a Commission order issued under Section 203(f) of the Act, or (B) convicted within the previous ten years of any felony or misdemeanor involving conduct described in Section 203(e) (2) (A)-(D) of the Act, or (C) who has been found by the Commission to have engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (4) or (5) or Section 203(e) of the Act, or (D) is subject to an order, judgment or decree described in Section 203(e) (3) of the Act; and

(iii) such cash fee is paid pursuant to a written agreement to which the adviser is a party; and

NOTE: The investment adviser shall retain a copy of each written agreement required by this paragraph as part of the records required to be kept under § 204-2(a) (10) of this chapter.

(2) such cash fee is paid to a solicitor:

(i) with respect to solicitation activities for the provision of impersonal advisory services only; or

(ii) who is (A) a partner, officer, director or employee of such investment adviser or (B) a partner, officer, director or employee of a person which controls, is controlled by, or is under common control with such investment adviser; provided that the status of such solicitor as a partner, officer, director or employee of such investment adviser or other person, and any affiliation between the investment adviser and such other person, is disclosed to the client at the time of the solicitation or referral; or

(iii) other than a solicitor specified in paragraph (a) (2) (i) or (ii) above if all of the following conditions are met:

(A) The written agreement required by paragraph (a) (1) (iii) of this section: (1) describes the solicitation activities to be engaged in by the solicitor on behalf of the investment adviser and the compensation to be received therefor; (2) contains an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the Act and the rules thereunder; (3) requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's written disclosure statement required by Rule 204-3 of this chapter ("brochure rule") and a separate written disclosure document described in paragraph (b) of this rule.

(B) The investment adviser receives from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

NOTE: The investment adviser shall retain a copy of each such acknowledgment and solicitor disclosure document as part of the records required to be kept under Rule 204-2(a) (15) of this chapter.

(C) The investment adviser makes a bona fide effort to ascertain whether the solicitor has complied with the agreement, and has a reasonable basis for believing that the solicitor has so complied.

(b) The separate written disclosure document required to be furnished by the solicitor to the client pursuant to this section shall contain the following information:

(1) The name of the solicitor;

(2) The name of the investment adviser;

(3) The nature of the relationship, including any affiliation, between the solicitor and the investment adviser;

(4) A statement that the solicitor will be compensated for his solicitation services by the investment adviser;

(5) The terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor; and

(6) The amount, if any, for the cost of obtaining his account the client will be charged in addition to the advisory fee, and the differential, if any, among clients with respect to the amount or level of advisory fees charged by the investment adviser if such differential is attributable to the existence of any arrangement pursuant to which the investment adviser has agreed to compensate the solicitor for soliciting clients for, or referring clients to, the investment adviser.

(c) Nothing in this section shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

(d) For purposes of this section,

(1) "Solicitor" means any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser.

(2) "Client" includes any prospective client.

(3) "Impersonal advisory services" means investment advisory services provided solely by means of (i) written materials or oral statements which do not purport to meet the objectives or needs of the specific client, (ii) statistical information containing no expressions of opinions as to the investment merits of particular securities, or (iii) any combination of the foregoing services. [Adopted in Release No. IA-688, effective September 30, 1979.]

Appendix D

1981 Release

(Release No. 770/August 13, 1981)

Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financial Related Services

Action

Statement of staff interpretive position.

Summary

The Commission is publishing the views of the staff of the Division of Investment Management as to the applicability of the Investment Advisers Act of 1940 to financial planners, pension consultants, and other persons who, as an integral component of other financially related services, provide investment advisory services to others for compensation. The purpose of this release is to call to the attention of persons providing such services, as well as members of the general public who may utilize such services, the circumstances under which persons providing these services would be investment advisers under the Advisers Act and subject to the Act's registration, antifraud and other provisions. The guidance provided in this release should assist providers of financial advisory services in complying with the Advisers Act and reduce the number of requests for staff interpretive or no-action advice with respect to the applicability of the Advisers Act to such persons where the requests do not present any novel factual or interpretive issues. With one exception the interpretive views set forth in the release are based on positions consistently taken by the staff in the past. In the case of the one exception, the position articulated in the release may have the effect of excepting from the definition of investment adviser certain persons the staff would not regard as being in the business of providing investment advice.

FOR FURTHER INFORMATION CONTACT:
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Supplementary Information

The staff of the Commission has received numerous requests for staff interpretive or no-action advice concerning the applicability of the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 *et seq.*] ("Advisers Act") to persons, such as financial planners, pension consultants, sports and entertainment representatives and others, who provide investment advisory services as an integral component of, or bundled with, other financially related services. In addition, it appears that many of these persons may not be aware of the provisions of the federal securities laws which may be applicable to their activities, particularly the fiduciary standards and registration requirements of the Advisers Act. It is the view of the staff that, for the reasons set forth below, many of the persons providing such services to the public are investment advisers under the definition of investment adviser contained in Section 202(a) (11) of the Advisers Act [15 U.S.C. 80b-2(a) (11)] and are not entitled to rely on any of the exceptions from that definition provided in clauses (A) to (F) of Section 202(a) (11). An investment adviser who uses the mails or any means of instrumentality of interstate commerce in connection with his or its business as an investment adviser is subject to the registration, antifraud, and other provisions of the Advisers Act, unless the adviser is excepted from registration under Section 203(b) of the Advisers Act [15 U.S.C. 80b-3(b)]. An adviser excepted from registration under the Advisers Act remains subject to its antifraud provisions.

I. Background

Financial planning typically involves the provision of a variety of services, principally advisory in nature, to individuals or families with respect to management of financial resources based upon an analysis of individual client needs. Generally, financial planning services involve the preparation of a financial program for a client based upon information elicited from the client as to the client's financial circumstances and objectives. Such information normally would cover present and anticipated assets and liabilities, including insurance, savings, investments, and anticipated retirement or other benefits. The program developed for the client typically includes general recommendations for a course of activity, or specific actions, to be taken by the client. For example, recommendations may be made that the client obtain insurance or revise existing coverage, establish an individual retirement account, increase or decrease funds held in savings accounts, or invest funds in securities. A financial planner may develop tax or estate plans for the client or may refer the client to an accountant or attorney for these services. The provider of such financial planning services typically assists the client in implementing the recommended program by, among other things, making specific recommendations to carry out the general recommendations of the program, or by selling to the client insurance products, securities, or other investments. The financial planner may also review the client's program periodically and recommend revisions. Persons providing such financial planning services use various compensation arrangements. Some financial planners charge clients an overall fee for the development of an individual client program while others charge clients an hourly fee. In some instances financial planners are compensated, in whole or in part, through the receipt of sales commissions upon the sale to the client of insurance products, mutual fund shares, interests in real estate, or other investments.

A second common form of service relating to financial matters is that provided by "pension consultants" who typically offer, in addition to administrative services, a variety of advisory services to employee benefit plans and their fiduciaries based upon an analysis of the needs of the individual plan. Such advisory services may include advice as to the types of funding media available to provide plan benefits, general recommendations as to what portion of plan assets should be invested in various investment

media, including securities, and, in some cases, recommendations regarding investment in specific securities or other investments. Pension consultants may also assist plan fiduciaries in determining plan investment objectives and policies and in designing funding media for the plan. They may also provide general or specific advice to plan fiduciaries as to the selection or retention of persons to manage the assets of the plan.[1] Persons providing such services to plans are customarily compensated for the provision of their services through the receipt of fees paid by the plan, its sponsor, or other persons; by means of sales commissions on the sale of insurance products or investments to the plan; or through a combination of fees and commissions.

Another form of financial advisory service is that provided by persons offering a variety of financially related services to entertainers or athletes based upon the needs of the individual client. Such persons, who often use the designation "sports representative" or "entertainment representative," typically offer a number of services to clients, including the negotiation of employment contracts and development of promotional opportunities for the client, as well as advisory services related to investments, tax planning, or budget and money management. Some persons providing these services to clients may assume discretion over all or a portion of a client's funds by collecting income, paying bills and making investments for the client. Sports or entertainment representatives are customarily compensated for the provision of their services primarily through fees charged for negotiation of employment contracts but may also receive compensation in the form of fixed charges on hourly fees for other services, including investment advisory services, which they provide.

There are other persons who, while not falling precisely into one of the foregoing categories, provide financial advisory services. As discussed below, financial planners, pension consultants, sports or entertainment representatives, or other persons providing financial advisory services may be investment advisers within the meaning of the Advisers Act.

II. Status as an Investment Adviser

A. *Definition of Investment Adviser*

Section 202(a) (11) of the Advisers Act defines the term "investment adviser" to mean:

> . . . any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

Whether a person providing financially related services of the type discussed in this release would be an investment adviser within the meaning of the Advisers Act would depend upon all the relevant facts and circumstances. As a general matter, however, if the activities of any person providing such integrated advisory services satisfy each element of either part of the foregoing two-part definition, such person would be an investment adviser within the meaning of the Advisers Act, unless entitled to rely on one of the exceptions from the definition of investment adviser in clauses (A) to (F) of Section

1. The authority to manage all or a portion of a plan's assets often is delegated to a person who qualifies as an "investment manager" under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 *et seq.*]. Under that statute, which is applicable to private sector pension and welfare benefit plans, an "investment manager" must be a registered investment adviser under the Advisers Act, a bank as defined in the Advisers Act, or an insurance company which is qualified to perform services as an investment manager under the laws of more than one state.

202(a) (11).[2] Accordingly, a determination as to whether a person providing financial planning, pension consulting, or other integrated advisory services is an investment adviser will depend upon whether such person: (1) provides advice, or issues reports or analyses, regarding securities; (2) whether he is in the business of providing such services; and (3) whether he provides such services for compensation. These three elements are discussed below.

1. *Advice or analyses concerning securities*

It would seem apparent that a person who gives advice or makes recommendations or issues reports or analyses with respect to specific securities is an investment adviser under Section 202(a) (11), assuming the other elements of the definition of investment adviser are met, i.e., that such services are performed as a part of a business and for compensation. However, it has been asked on a number of occasions whether advice, recommendations or reports that do not pertain to specific securities satisfy this element of the definition. In the view of the staff, a person who provides advice, or issues or promulgates reports or analyses, which concern securities, but which do not relate to specific securities, would generally be an investment adviser under Section 202(a) (11), assuming such services are performed as part of a business[3] and for compensation. The staff has interpreted the definition of investment adviser to include persons who advise clients either directly or through publications or writings concerning the relative advantages and disadvantages of investing in securities in general as compared to other investment media.[4] A person who, in the course of developing a financial program for a client, advises a client as to the desirability of investing in securities as opposed to, or in relation to, stamps, coins, direct ownership of commodities, or any other investment vehicle would also be "advising" others within the meaning of Section 202(a) (11).[5] Similarly, a person who advises employee benefit plans on funding plan benefits by investing in securities, as opposed to, or in addition to, insurance products, real estate or other funding media, would be "advising" others within the meaning of Section 202(a) (11). A person providing advice to a client as to the selection or retention of an investment manager or managers also would, under certain circumstances, be deemed to be "advising" others within the meaning of Section 202(a) (11).[6]

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2. *See* discussion of Section 202(a) (11) (A) to (F) in Section II B, *infra*.

3. In this regard, as discussed in detail below, it is the staff's view that a person who gives advice or prepares analyses concerning securities generally may, nevertheless, not be "in the business" of doing so and, therefore, will not be considered an "investment adviser" as that term is used in Section 202(a) (11).

4. *See, e.g.*, Richard K. May (avail. Dec. 11, 1979); Hayes Martin (avail. Feb. 15, 1980); Pauline Wang (avail. Mar. 21, 1980).

5. *See, e.g.*, Thomas Beard (avail. May 8, 1975); Sinclair-deMarinis Inc. (avail. May 1, 1981).

6. *See, e.g.*, FPC Securities Corp. (avail. Dec. 1, 1974) (program to assist client in selection and retention of investment manager by, among other things, recommending investment managers to clients, monitoring and evaluating the performance of a client's investment manager, and advising clients as to the retention of such manager); William Bye Co. (avail. Apr. 26, 1973) (program involving recommendations to client as to selection and retention of investment manager based upon client's investment objectives and periodic monitoring and evaluation of investment manager's performance). On occasion in the past the staff has taken no-action positions with respect to certain situations involving persons providing advice to clients as to the selection or retention of investment managers. *See, e.g.*, Sebastian Associates, Ltd., (avail. Aug. 7, 1975) (provision of assistance to clients in obtaining and coordinating the services of various professionals such as tax attorneys and investment advisers, including referring clients to such professionals, in connection

(footnote continued on page 81)

2. *The "business" standard*

In order to come within the definition of an investment adviser, a person must engage for compensation in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or issue or promulgate reports or analyses concerning securities as part of a regular business. Under this definition, the giving of advice or issuing of reports or analyses concerning securities for compensation need not constitute the principal business activity or any particular portion of the business activities of a person in order for the person to be an investment adviser under Section 202(a) (11). However, a person who provides investment advice for compensation but is not *in the business* of advising others as to the value of securities or the advisability of investing in securities, or does not issue reports or analyses concerning securities as part of *a regular business*, does not come within the Advisers Act's definition of an investment adviser.

Whether or not a person's activities constitute being engaged in the business of advising others as to the value of securities or the advisability of investing in securities or issuing reports or analyses concerning securities as part of a regular business will depend on (1) whether the investment advice being provided is solely incidental to a non-investment advisory, primary business of the person providing the advice; (2) the specificity of the advice being given; and (3) whether the provider of the advice is receiving, directly or indirectly, any special compensation therefor.[7] As a general matter, the staff would take the position that a person who provides financial services including investment advice for compensation is *in the business* of providing investment advice within the meaning of Section 202(a) (11) unless the advice being provided by such person is solely incidental to a non-investment advisory business of the person, is non-specific, and is not rewarded by special compensation for such investment advice.

If a person holds himself out as an investment adviser or as one who provides investment advice, he would be considered to be in the business of providing investment advice. However, a person whose principal business is providing financial services other than investment advice would not be regarded as being *in the business* of giving investment advice if, as part of his service, he merely discusses in general terms the advisability of investing in securities in the context of, for example, a discussion of economic matters or the role of investments in securities in a client's overall financial plan. The staff would, however, take the position that such a person is in the business of providing investment advice if, on anything other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities (e.g., bonds, mutual funds, technology stocks, etc.).[8] In addition, a person who provides market timing services would be viewed as being in the business of giving investment advice. Finally, as previously indicated, a person will be regarded as being in the business of providing such advice if he receives any special compensation therefor or receives any direct or indirect remuneration in connection with a client's purchase or sale of securities. A person would generally not be considered to be receiving special compensation for the provision of advisory

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with business as agent for clients with respect to negotiation of employment and promotional contracts); Hudson Valley Planning Inc. (avail. Feb. 25, 1978) (provision of names of several investment managers to client upon request, without recommendation, in connection with business of providing administrative services to employee benefit plans).

7. These criteria were developed as part of the staff's on-going review of prior staff interpretive letters and have not previously been articulated.

8. *Compare, Zinn* v. *Parrish*, 644 F.2d 360 (7th Cir. 1981), CCH Sec. L. Rep. ¶97,920.

services if he makes no charge for the advisory portion of his services or if he charges an overall fee for financial advisory services of which the investment advice is an incidental part.

3. *Compensation*

The definition of investment adviser applies to persons who give investment advice and receive compensation therefor. This compensation element is satisfied by the receipt of any economic benefit, whether in the form of an advisory fee, some other fee relating to the total services rendered, commissions, or some combination of the foregoing. It is not necessary that a person who provides investment advisory and other services to a client charge a separate fee for the investment advisory portion of the total services. The compensation element would be satisfied if a single fee were charged for the provision of a number of different services, which services included the giving of investment advice or the issuing of reports or analyses concerning securities within the meaning of the Advisers Act.[9] As discussed above, however, the fact that no separate fee is charged for the investment advisory portion of the service could be relevant to whether the person is "in the business" of giving investment advice.

It is not necessary that an adviser's compensation be paid directly by the person receiving investment advisory services, but only that the investment adviser receive compensation from some source for his services.[10] Accordingly, a person providing a variety of services to a client, including investment advisory services, for which the person receives any economic benefit, for example, by receipt of a single fee or commissions upon the sale to the client of insurance products or investments, would be performing such advisory services "for compensation" within the meaning of Section 202(a) (11) of the Advisers Act.[11]

B. *Exceptions from definition of investment adviser*

Clauses (A) to (E) of Section 202(a) (11) of the Advisers Act set forth limited exceptions from the definition of investment adviser available to certain persons.[12] Whether

9. *See, e.g.*, FINESCO (avail. Dec. 11, 1979).

10. *See, e.g.*, Warren H. Livingston (avail. Mar. 8, 1980).

11. Section 202(a) (11)(C) of the Advisers Act excepts from the definition of investment adviser a broker or dealer who performs investment advisory services which are incidental to the conduct of its broker-dealer business and who receives no special compensation therefor. *See* discussion of Section 202(a) (11)(C) *infra*.

12. Section 202(a) (11) provides that the definition of investment adviser does not include:

(A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company;

(B) any lawyer, accountant, engineer or teacher whose performance of such [advisory] services is solely incidental to the practice of his profession;

(C) any broker or dealer whose performance of such [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor;

(D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation;

(E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall be designated by the Secretary of the Treasury, pursuant to Section 3(a) (12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act. . . .

(footnote continued on page 83)

an exception from the definition of investment adviser is available to any financial planner, pension consultant, or other person, providing investment advisory services within the meaning of Section 202(a) (11), will depend upon the relevant facts and circumstances.

A person relying on an exception from the definition of investment adviser must meet all of the requirements of such exception. It is the view of the staff that the exception contained in Section 202(a) (11) (B) would not be available, for example, to a lawyer or accountant who holds himself out to the public as providing financial planning, pension consulting, or other financial advisory services. In such a case it would appear that the performance of investment advisory services by such person would be incidental to the practice of his financial planning or pension consulting profession and not incidental to his practice as a lawyer or accountant.[13] Similarly, the exception for brokers or dealers contained in Section 202(a) (11) (C) would not be available to a broker or dealer, or associated person of a broker or dealer, acting within the scope of its business as broker or dealer, if such person receives any special compensation for the provision of investment advisory services.[14] Moreover, the exception from the definition of investment adviser contained in Section 202(a) (11) (C) would not be available to an associated person of a broker-dealer or "registered representative" who provides investment advisory services to clients outside of the scope of such person's employment with the broker-dealer.[15]

III. Registration as an Investment Adviser

Any person who is an investment adviser within the meaning of Section 202(a) (11) of the Advisers Act, who is not excepted from the definition of investment adviser by virtue of one of the exceptions in Section 202(a) (11) (A) to (F), and who makes use of the mails or any instrumentality of interstate commerce in connection with such person's business as an investment adviser, is required by Section 203(a) of the Advisers Act to register with the Commission as an investment adviser unless specifically excepted

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Section 202(a) (11) (F) excepts from the definition of investment adviser "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

13. *See, e.g.*, Mortimer M. Lerner (avail. Feb. 15, 1980). The "professional" exception provided in Section 202(a) (11) (B) by its terms is only available to lawyers, accountants, engineers, and teachers. A person engaged in a profession other than one of those enumerated in Section 202(a) (11) (B) who performs investment advisory services would be an investment adviser within the meaning of Section 202(a) (11) whether or not the performance of investment advisory services is incidental to the practice of such profession. Unless another basis for excepting such person from the definition of investment adviser is available, such person would be subject to the Advisers Act.

14. *See, e.g.*, FINESCO, *supra*. For a general statement of the views of the staff regarding special compensation under Section 202(a) (11) (C), see Investment Advisers Act Release No. 640 (October 5, 1978).

15. *See, e.g.*, George E. Bates (avail. Apr. 26, 1979).

from registration by Section 203(b) of the Advisers Act.[16] The materials necessary for registering with the Commission as an investment adviser can be obtained by writing Publications Unit, Securities and Exchange Commission, Washington, D.C. 20549.

IV. Application of Antifraud Provisions

The antifraud provisions of Section 206 of the Advisers Act [15 U.S.C. 80b-6], and the rules adopted by the Commission thereunder, apply to any person who is an investment adviser as defined in the Advisers Act, whether or not such person is required to be registered with the Commission as an investment adviser. Sections 206(1) and (2) make it unlawful for an investment adviser, directly or indirectly, to "employ any device, scheme, or artifice to defraud any client or prospective client" or to "engage in any transaction practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[17] An investment adviser is a fiduciary who owes his clients "an affirmative duty of 'utmost good faith, and full and fair' disclosure of all material facts."[18] The Supreme Court has stated that a "[f]ailure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions under which predatory practices best thrive."[19] Accordingly, the duty of an investment adviser to refrain from fraudulent conduct includes an obligation to disclose material facts to his clients whenever the failure to do so would defraud or operate as a fraud or deceit upon any client or prospective client. In this connection the adviser's duty to disclose material facts is particularly pertinent whenever the adviser is in a situation involving a conflict, or potential conflict, of interest with a client.

The type of disclosure required by an investment adviser who has a potential conflict of interest with a client will depend upon all the facts and circumstances. As a general matter, an adviser must disclose to clients all material facts regarding the potential con-

16. Section 203(b) excepts from registration

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisting trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the [Investment Company Act]. . . .

17. In addition, Section 206(3) of the Advisers Act generally makes it unlawful for an investment adviser acting as principal for his own account knowingly to sell any security to or purchase any security from a client, or, acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The responsibilities of an investment adviser dealing with a client as principal or as agent for another person are discussed in Advisers Act Release Nos. 40 and 470 (February 5, 1945 and August 20, 1975, respectively).

18. *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963) quoting Prosser, Law of Torts (1955), 534-535.

19. *Id.*, at 200.

flict of interest so that the client can make an informed decision as to whether to enter into or continue an advisory relationship with the adviser or whether to take some action to protect himself against the specific conflict of interest involved. The following examples, which have been selected from cases and staff interpretive and no-action letters, illustrate the scope of the duty to disclose material information to clients in certain common situations involving conflicts of interest.

An investment adviser who is also a registered representative of a broker-dealer and provides investment advisory services outside the scope of his employment with the broker-dealer must disclose to his advisory clients that his advisory activities are independent from his employment with the broker-dealer.[20] Additional disclosures would be required, depending on the circumstances, if the investment adviser recommends that his clients execute securities transactions through the broker-dealer with which the investment adviser is associated. For example, the investment adviser would be required to disclose fully the nature and extent of any interest the investment adviser has in such recommendation, including any compensation the investment adviser would receive from his employer in connection with the transaction.[21] In addition, the investment adviser would be required to inform his clients of their ability to execute recommended transactions through other broker-dealers.[22] Finally, the Commission has stated that "an investment adviser must not effect transactions in which he has a personal interest in a manner that could result in preferring his own interest to that of his advisory clients."[23]

An investment adviser who structures his personal securities transactions to trade on the market impact caused by his recommendations to clients must disclose this practice to clients.[24] An investment adviser generally also must disclose if his personal securities transactions are inconsistent with the advice given to clients.[25] Finally, an investment adviser must disclose compensation received from the issuer of a security being recommended.[26]

Unlike other general antifraud provisions in the Federal securities laws which apply to conduct "in the offer or sale of any securities"[27] or "in connection with the purchase or sale of any security,"[28] the pertinent provisions of Section 206 do not refer to dealings in securities but are stated in terms of the effect or potential effect of prohibited conduct on the client. Specifically, Section 206(1) prohibits "any device, scheme, or artifice to defraud any client or prospective client," and Section 206(2) prohibits "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." In this regard, the Commission has applied Sections 206(1) and (2) in circumstances in which the fraudulent conduct arose out of the investment advisory

20. David P. Atkinson (avail. Aug. 1, 1977).

21. *Ibid.*

22. Don P. Matheson (avail. Sept. 1, 1976).

23. Kidder, Peabody & Co., Inc. 43 S.E.C. 911, 916 (1968).

24. *SEC* v. *Capital Gains Research Bureau, supra* at 197.

25. *In the Matter of Dow Theory Letters et al.*, Advisers Act Release No. 571 (February 22, 1977).

26. *In the Matter of Investment Controlled Research et al.*, Advisers Act Release No. 701 (September 17, 1979).

27. Section 17(a) [15 U.S.C. 77q(a)] of the Securities Act of 1933 [15 U.S.C. 77a et seq.].

28. Rule 10b-5 [17 CFR 240.10b-5] under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]. *See also* Section 15(c) [15 U.S.C. 78o(c)] of the Securities Exchange Act of 1934.

relationship between an investment adviser and its clients, even though the conduct did not involve a securities transaction. For example, in an administrative proceeding brought by the Commission against an investment adviser, the respondent consented to a finding by the Commission that the respondent had violated Sections 206(1) and (2) by persuading its clients to guarantee its bank loans and ultimately to post their securities as collateral for its loans without disclosing the adviser's deteriorating financial condition, negative net worth, and other outstanding loans.[29] Moreover, the staff has taken the position that an investment adviser who sells non-securities investments to clients must, under Sections 206(1) and (2), disclose to clients and prospective clients all its interests in the sale to them of such non-securities investments.[30]

V. Need for Interpretive Advice

The general interpretive guidance provided in this release should facilitate greater compliance with the Advisers Act. The staff will respond to routine requests for no-action or interpretive advice relating to the status of persons engaged in the types of businesses described in this release by referring persons making such requests to the release, unless the requests present novel factual or interpretive issues such as material departures from the nature and type of services and compensation arrangements discussed above. Requests for no-action or interpretive advice from the staff should be submitted in accordance with the procedures set forth in Investment Advisers Act Release No. 281 (Jan. 25, 1971).

Accordingly, Part 276 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding Investment Advisers Act Release No. 1A-770, Statement of the staff as to the applicability of the Investment Advisers Act to financial planners, pension consultants, and other persons who provide investment advisory services as an integral component of other financially related services, thereto.

By the Commission.

George A. Fitzsimmons
Secretary

29. *In the Matter of Ronald B. Donati Inc. et al.*, Advisers Act Rel. Nos. 666 and 683 (February 8, 1979 and July 2, 1979 respectively). *See also Intersearch Technology, Inc.* CCH Fed. Sec. L. Rep. 1974-1975 Trans. Binder ¶80,139 (Feb. 28, 1979) at 85,189.

30. *See, Boston Advisory Group* (avail. Dec. 5, 1976).

Appendix E

Form ADV and Instructions

OMB APPROVAL
OMB No.: 3235-0049
Expires: June 30, 1988

FORM ADV INSTRUCTIONS

1. **This is a Uniform Form for use by investment advisers to:**
   - register with the Securities and Exchange Commission and the jurisdictions that require advisers to register.
   - update those registrations. When updating, complete all amended pages in full and circle the number of the item being changed. Each amendment must include the execution page.
2. **Organization**

   The Form contains two parts. Parts I and II are filed with the SEC and the jurisdictions; Part II can be given to clients to satisfy the brochure rule. The Form also contains the following schedules:
   - Schedule A — for corporations;
   - Schedule B — for partnerships;
   - Schedule C — for entities that are not sole proprietorships, partnerships or corporations;
   - Schedule D — for reporting information about individuals under Part I Items 11 and 12;
   - Schedule E — for continuing responses to Part I items;
   - Schedule F — for continuing responses to Part II items; and
   - Schedule G — for the balance sheet required by Part II Item 14.
3. **Format**
   - Type all information.
   - Give all individual names in full, including full middle names.
   - Use only Form ADV and its Schedules or a reproduction of them.
4. **Signature**
   - All filings and amendments must be filed with a signed execution page (page 1).
   - Each copy filed with the Securities and Exchange Commission and any jurisdiction must be manually signed.

If applicant is	Form ADV should be signed by
• a sole proprietor	the proprietor
• a partnership	a general partner for the partnership
• a corporation	an authorized principal officer for the corporation
• any other organization	the managing agent (an authorized person that participates in managing or directing applicant's affairs)

5. **General Definitions** (Additional definitions appear in Part I Item 11 and Part II.)
   - Applicant — The investment adviser applying on or amending this Form.
   - Client — An investment advisory client of the applicant.
   - Control — The power to direct or cause the direction of the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any individual or firm that is a director, partner or officer exercising executive responsibility (or having similar status or functions) or that directly or indirectly has the right to vote 25 percent or more of the voting securities or is entitled to 25 percent or more of the profits is presumed to control that company. (This definition is used solely for the purpose of Form ADV.)
   - Custody — A person has custody if it directly or indirectly holds client funds or securities, has any authority to obtain possession of them, or has the ability to appropriate them. An adviser has custody, for example, if it has a general power of attorney over a client's account or has signatory power over a client's checking account. (The definition and examples are for the convenience of registrants. Depending on the facts and circumstances, other situations also may involve custody.)
   - Jurisdiction — Any non-Federal government or regulatory body in the United States, or Puerto Rico.
   - Person — An individual, partnership, corporation or other organization.
   - Related person — Any officer, director or partner of applicant or any person directly or indirectly controlling, controlled by or under common control with the applicant, including any non-clerical, non-ministerial employee.
   - Self-regulatory organization — Any national securities or commodities exchange or registered association, or registered clearing agency.

SEC 1707 (10-85)

6. **Continuation Sheets** — Schedules E and F provide additional space for continuing Form ADV items (Schedule E for Part I; Schedule F for Part II) but not for continuing Schedules A, B, C, D or G. To continue those schedules, use copies of the schedule being continued.

7. **SEC Filings**
   - Submit filings in triplicate to the U.S. Securities and Exchange Commission, Washington, D.C. 20549. To register, submit a check or money order for $150 payable to the U.S. Securities and Exchange Commission. This fee is non-refundable. There is no fee for amendments.
   - **Non-Residents** — Rule 0-2 under the Investment Advisers Act of 1940 [17 CFR 275.0-2] covers those non-resident persons named anywhere in Form ADV that must file a consent to service of process and a power of attorney. Rule 204-2(j) under the Investment Advisers Act of 1940 [17 CFR 275.204-2] covers the notice of undertaking on books and records non-residents must file with Form ADV.
   - **Updating.** Federal law requires filing amendments:
     — promptly for *any* changes in:
     Part I — Items 1, 2, 3, 4, 5, 8, 11, 13A, 13B, 14A, and 14B;
     — promptly for *material* changes in:
     Part I — Items 9 and 10 and all items of Part II except Item 14;
     — within 90 days of the end of the fiscal year for any other changes.
   - **Federal Information Law and Requirements** — Investment Advisers Act of 1940 Sections 203(c), 204, 206, and 211(a) authorize the SEC to collect the information on this Form from applicants for investment adviser registration. The information is used for regulatory purposes, including deciding whether to grant registration. The SEC maintains files of the information on this form and makes it publicly available. Only the Social Security Number, which aids identifying the applicant, is voluntary. The SEC may return as unacceptable Forms that do not include all other information. By accepting this Form, however, the SEC does not make a finding that it has been filled out or submitted correctly. Intentional misstatements or omissions constitute Federal criminal violations under 18 USC 1001 and 15 USC 80b-17.

8. **Filings in Jurisdictions** — Consult the requirements of each jurisdiction in which you are filing to determine its requirements for, among other things:
   - filings
   - updates
   - financial statements
   - bonding
   - examinations and qualifications
   - photographs and fingerprints
   - limitations on advisory fees

   Information on a jurisdiction's requirements is available from its Securities Administrator. For the address and telephone number of the Securities Administrator in a jurisdiction, contact the North American Securities Administrators Association, Inc., 2930 S.W. Wanamaker Drive, Suite 5, Topeka, Kansas 66614, (913) 273-2600.

FORM ADV
Part I - Page 1

Uniform Application for Investment Adviser Registration

OMB APPROVAL
OMB No.: 3235-0049
Expires: June 30, 1988

This filing is an: ☐ Initial Application
or an: ☐ Amendment

If this filing is an Amendment:
- Give the Applicant's SEC File Number 801-_____ Yes ☐ No ☐
- Is Applicant now active in business as an Investment Adviser? Yes ☐ No ☐

WARNING: Failure to complete this Form accurately and keep it current subjects applicant to administrative, civil and criminal penalties.

1. A. Applicant's full name (If sole proprietor, state last, first and middle name):

   B. Name under which business is conducted, if different:

   C. If business name is being amended, give previous name:

2. A. Principal place of business: (Number and Street — Do not use P.O. Box Number) (City) (State) (Zip Code)

   B. Hours business is conducted at this location: from to

   C. Telephone Number at this location: (Area Code) (Telephone Number)

   D. Mailing address, if different from address given in 2A: (Number and Street or P.O. Box Number) (City) (State) (Zip Code)

   E. Is the address in Item 2A or 2D being amended in this filing? ..... Yes ☐ No ☐

   F. On Schedule E give the addresses and telephone numbers of all offices at which applicant's investment advisory business is conducted, other than the one given in Item 2A.

3. A. If books and records required by Section 204 of the Investment Advisers Act of 1940 are kept somewhere other than at the principal place of business given in Item 2A, give the following information (if kept in more than one place, give additional names, addresses and hours of business on Schedule E):
   Name and address of entity where books and records are kept:

   (Number and Street) (City) (State) (Zip Code)

   B. Hours business is conducted at this location: from to

   C. Telephone Number at this location: (Area Code) (Telephone Number)

EXECUTION

For the purpose of complying with the laws of the State(s) I have marked in Item 7 relating to the giving of investment advice, I hereby certify that the applicant is in compliance with applicable state surety bonding requirements and irrevocably appoint the administrator of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of those State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I were a resident in said State(s) and had lawfully been served with process in said State(s).

The undersigned, being first duly sworn, deposes and says that he has executed this Form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including exhibits attached hereto and other information filed herewith, all of which are made a part hereof, are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended, such information is currently accurate and complete.

Date:	Name of Applicant:	By (Signature):
Typed Name and Title:		
Subscribed and sworn before me this _____ day of _____ 19____		
By:		
My commission expires	County of	State of

Answer all items.

FORM ADV Part I - Page 2	Applicant:	SEC File Number: 801-	Date:

4. A. Persons to contact for further information about this Form: (Name) (Title)

B. Mailing Address (Number and Street, City, State, Zip Code): | Area Code and Telephone Number: ( )

5. A. Applicant consents that notice of any proceeding before the Securities and Exchange Commission or a jurisdiction in connection with its investment adviser registration may be given by registered or certified mail or confirmed telegram to: (Last Name) (First Name) (Middle Name)

B. (Number and Street) (City) (State) (Zip Code) | 6. Applicant's fiscal year ends: (Month) (Day)

7. In the box below, give status of applicant's investment adviser registration by indicating:
"1" for pending
"2" for registered
"3" for withdrawn before registration within the last 10 years
"4" for previously registered within the last 10 years

Securities and Exchange Commission ____

AL ___ AK ___ AZ ___ AR ___ CA ___ CO ___ CT ___ DE ___ DC ___ FL ___ GA ___ HI ___ ID ___
IL ___ IN ___ IA ___ KS ___ KY ___ LA ___ ME ___ MD ___ MA ___ MI ___ MN ___ MS ___ MO ___
MT ___ NE ___ NV ___ NH ___ NJ ___ NM ___ NY ___ NC ___ ND ___ OH ___ OK ___ OR ___ PA ___
RI ___ SC ___ SD ___ TN ___ TX ___ UT ___ VT ___ VA ___ WA ___ WV ___ WI ___ WY ___ Puerto Rico ___
Other (Specify): ___

8. Applicant is a (check box that applies and complete those items):

A. ☐ CORPORATION - Complete Schedule A.	(1) Date of incorporation (Month, Day, Year):	(2) Jurisdiction where incorporated:		
B. ☐ PARTNERSHIP - Complete Schedule B.	(1) Date of establishment (Month, Day, Year):	(2) Current legal address (Number, Street, City, State, Zip Code):		
C. ☐ SOLE PROPRIETORSHIP	(1) Date business began (Month, Day, Year):	(2) Current residence address of proprietor: (Number, Street, City, State, Zip Code)	(3) Social Security No.	
D. ☐ Other - Specify Complete Schedule C	(1) Date of establishment (Month, Day, Year):	(2) Current legal address (Number, Street, City, State, Zip Code):		

9. Is the applicant taking over the business of a registered investment adviser? (If yes, describe the transfer on Schedule E, including the transfer date, and predecessor's full name, IRS employer number and SEC file number) ..... Yes ☐ No ☐

10. A. Does any person not named in Item 1A or Schedules A, B, or C, through agreement or otherwise, control the management or policies of applicant? ..... Yes ☐ No ☐

(If yes, state on Schedule E the exact name of each person and describe the basis for the person's control.)

B. Is the applicant financed by a person not named in Items 1A or Schedule A, B, or C other than by: (1) a public offering under the Securities Act of 1933; (2) credit given in the ordinary course of business by banks, suppliers or others; or (3) a satisfactory subordination agreement under Securities Exchange Act of 1934 Rule 15c3-1 (17 CFR 240.15c3-1)? ..... Yes ☐ No ☐

(If yes, state on Schedule E the exact name of each person and describe the arrangement through which financing is made available, including the amount.)

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

11. Disciplinary questions. Definitions:

- Advisory affiliate — A person named in Items 1A, 10A or Schedules A, B or C; or an individual or firm that directly or indirectly controls or is controlled by the applicant, including any current employee except one performing only clerical, administrative, support or similar functions.
- Investment or investment-related — Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank or savings and loan association).
- Involved — Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

A. In the past ten years has the applicant or an advisory affiliate been convicted of or pleaded guilty or nolo contendre ("no contest") to:

(1) a felony or misdemeanor involving:

- investment or an investment-related business
- fraud, false statements, or omissions
- wrongful taking of property or
- bribery, forgery, counterfeiting, or extortion? ☐ Yes ☐ No

(2) any other felony? ☐ Yes ☐ No

B. Has any court:

(1) in the past ten years, enjoined the applicant or an advisory affiliate in connection with any investment-related activity? ☐ Yes ☐ No

(2) ever found that the applicant or an advisory affiliate was involved in a violation of investment-related statutes or regulations? ☐ Yes ☐ No

C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:

(1) found the applicant or an advisory affiliate to have made a false statement or omission? ☐ Yes ☐ No

(2) found the applicant or an advisory affiliate to have been involved in a violation of its regulations or statutes? ☐ Yes ☐ No

(3) found the applicant or an advisory affiliate to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted? ☐ Yes ☐ No

(4) entered an order denying, suspending or revoking the applicant's or an advisory affiliate's registration or otherwise disciplined it by restricting its activities? ☐ Yes ☐ No

D. Has any other federal regulatory agency or any state regulatory agency:

(1) ever found the applicant or an advisory affiliate to have made a false statement or omission or been dishonest, unfair, or unethical? ☐ Yes ☐ No

(2) ever found the applicant or an advisory affiliate to have been involved in a violation of investment regulations or statutes? ☐ Yes ☐ No

(3) ever found the applicant or an advisory affiliate to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted? ☐ Yes ☐ No

(4) in the past ten years, entered an order against the applicant or an advisory affiliate in connection with an investment-related activity? ☐ Yes ☐ No

(5) ever denied, suspended, or revoked the applicant's or an advisory affiliate's registration or license, prevented it from associating with an investment-related business, or otherwise disciplined it by restricting its activities? ☐ Yes ☐ No

(6) ever revoked or suspended the applicant's or an advisory affiliate's license as an attorney or accountant? ☐ Yes ☐ No

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

E. Has any self-regulatory organization or commodities exchange ever:

		Yes	No
(1)	found the applicant or an advisory affiliate to have made a false statement or omission?	☐	☐
(2)	found the applicant or an advisory affiliate to have been involved in a violation of its rules?	☐	☐
(3)	found the applicant or an advisory affiliate to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4)	disciplined the applicant or an advisory affiliate by expelling or suspending it from membership, by barring or suspending its association with other members, or by otherwise restricting its activities?	☐	☐

F. Has any foreign government, court, regulatory agency, or exchange ever entered an order against the applicant or an advisory affiliate related to investments or fraud? Yes ☐ No ☐

G. Is the applicant or an advisory affiliate now the subject of any proceeding that could result in a 'yes' answer to parts A-F of this item? Yes ☐ No ☐

H. Has a bonding company denied, paid out on, or revoked a bond for the applicant? Yes ☐ No ☐

I. Does the applicant have any unsatisfied judgments or liens against it? Yes ☐ No ☐

J. Has the applicant or an advisory affiliate of the applicant ever been a securities firm or an advisory affiliate of a securities firm that has been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure begun? Yes ☐ No ☐

K. Has the applicant, or an officer, director or person owning 10% or more of the applicant's securities failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt? Yes ☐ No ☐

If a 'yes' answer on Item 11 involves:

- an individual, complete a Schedule D for the individual
- a partnership, corporation or other organization, on Schedule E give the following details of any court or regulatory action:
  - the organization and individuals named
  - the title and date of the action
  - the court or body taking the action
  - a description of the action.

12. Individual's Education, Business and Disciplinary Background. Complete a Schedule D for each individual who is:

A. The applicant, named in Part I Item 1A

B. A control person named in Part I Item 10

C. An owner of at least 10% of a class of applicant's equity securities

D. An officer, director, partner, or individual with similar status of applicant, described in Schedule A Item 2a, Schedule B Item 2, or Schedule C Item 2

E. A member of the applicant's investment committee that determines general investment advice to be given to clients

F. If applicant has no investment committee, an individual who determines general investment advice (if more than five, complete for their supervisors only)

G. An individual giving investment advice on behalf of the applicant in the jurisdiction in which this application is filed

H. An individual reporting a 'yes' answer to the disciplinary question, Part I Item 11

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

13. Does applicant have custody (see definition in instructions) of any advisory client:

	Yes	No
A. funds	☐	☐
B. securities	☐	☐

C. If either answer is yes, the value of those funds and securities at the end of applicant's last fiscal year was:

(1) ☐ under $100,000
(2) ☐ $100,000 to $1,000,000
(3) ☐ $1,000,0001 to $5,000,000
(4) ☐ Over $5,000,000

14. Do any of applicant's related persons have custody (see definition in instructions) of any advisory client:

	Yes	No
A. funds	☐	☐
B. securities	☐	☐

If either is yes:

	Yes	No
C. is that person a registered broker-dealer qualified to take custody under Section 15 of the Securities Exchange Act of 1934?	☐	☐

D. the value of those funds and securities at the end of applicant's last fiscal year was:

(1) ☐ under $100,000
(2) ☐ $100,000 to $1,000,000
(3) ☐ $1,000,001 to $5,000,000
(4) ☐ Over $5,000,000

	Yes	No
15. Does applicant require prepayment of fees of more than $500 per client and more than 6 months in advance?	☐	☐

16. With a few exceptions, the "brochure rule" (Advisers Act Rule 204-3) requires that clients must be given information about the investment adviser. Will applicant be giving clients:

	Yes	No
A. Part II of this Form ADV?	☐	☐
B. Another document that includes at least the information contained in Form ADV Part II?	☐	☐

17. A. The number of employees of applicant who perform investment advisory functions (including research, but excluding unrelated functions such as accounting) is: (check only one box)

(1) ☐ 1 person, part time
(2) ☐ 1 person primarily involved in providing investment advisory services
(3) ☐ 2-9 persons
(4) ☐ 10 or more persons

B. The number of clients to whom applicant provided advisory services during the last fiscal year was:

(1) ☐ 14 or fewer
(2) ☐ 15 to 50
(3) ☐ 51 to 100
(4) ☐ 101 to 500
(5) ☐ over 500

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

18. Does applicant manage client securities portfolios on a discretionary basis? ..... Yes ☐ No ☐

If yes, at the end of applicant's last fiscal year these accounts:

A. numbered _____. B. totaled in aggregate market value, rounded to nearest thousand ..... $_____000.00

19. Does applicant manage or supervise client securities portfolios on a non-discretionary basis? ..... Yes ☐ No ☐

If yes, at the end of applicant's last fiscal year these accounts:

A. numbered _____. B. totaled in aggregate market value, rounded to nearest thousand ..... $_____000.00

20. Does applicant hold itself out as providing financial planning or some similarly termed services to clients? ..... Yes ☐ No ☐

If yes, during the last fiscal year applicant provided financial planning services to clients:

A. who numbered:

(1) ☐ 14 or fewer
(2) ☐ 15 to 50
(3) ☐ 51 to 100
(4) ☐ 101 to 500
(5) ☐ over 500

B. whose investments in financial products based on those services totaled:

(1) ☐ under $100,000
(2) ☐ $100,000 to $1,000,000
(3) ☐ $1,000,001 to $5,000,000
(4) ☐ over $5,000,000

21. Did applicant recommend securities to clients during its last fiscal year in which the applicant acted (itself or through a related person) as an underwriter, general or managing partner, or offeree representative, or had any ownership or sales interest (other than the receipt of normal and customary sales commissions as a broker or brokers representative)? ... Yes ☐ No ☐

If yes, the approximate value of securities so recommended during its last fiscal year is:

A. ☐ Under $50,000
B. ☐ $50,000 to $250,000
C. ☐ $250,001 to $1,000,000
D. ☐ over $1,000,000

22. Attach to this Form any financial statements required by the jurisdiction in which applicant is filing, other than the balance sheet required by Part II Item 14.

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

FORM ADV
Part II - Page 1

Uniform Application for Investment Adviser Registration

OMB APPROVAL
OMB No.: 3235-0049
Expires: June 30, 1988

Name of Investment Adviser:						
Address:	(Number and Street)	(City)	State)	(Zip Code)	Area Code: ( )	Telephone Number:

This part of Form ADV gives information about the investment adviser and its business for the use of clients. The information has not been approved or verified by any governmental authority.

Table of Contents

(Schedules A, B, C, D, and E are included with Part I of this Form, for the use of regulatory bodies, and are not distributed to clients.)

Applicant:	SEC File Number: 801-	Date:

Definitions for Part II

Related person — Any officer, director or partner of applicant or any person directly or indirectly controlling, controlled by, or under common control with the applicant, including any non-clerical, non-ministerial employee.

Investment Supervisory Services — Giving continuous investment advice to a client (or making investments for the client) based on the individual needs of the client. Individual needs include, for example, the nature of other client assets and the client's personal and family obligations.

1. A. **Advisory Services and Fees.** (check the applicable boxes)

Applicant:

For each type of service provided, state the approximate % of total advisory billings from that service. (See instruction below.)

- ☐ (1) Provides investment supervisory services ..... _____%
- ☐ (2) Manages investment advisory accounts not involving investment supervisory services ..... _____%
- ☐ (3) Furnishes investment advice through consultations not included in either service described above ..... _____%
- ☐ (4) Issues periodicals about securities by subscription ..... _____%
- ☐ (5) Issues special reports about securities not included in any service described above ..... _____%
- ☐ (6) Issues, not as part of any service described above, any charts, graphs, formulas, or other devices which clients may use to evaluate securities ..... _____%
- ☐ (7) On more than an occasional basis, furnishes advice to clients on matters not involving securities ..... _____%
- ☐ (8) Provides a timing service ..... _____%
- ☐ (9) Furnishes advice about securities in any manner not described above ..... _____%

(Percentages should be based on applicant's last fiscal year. If applicant has not completed its first fiscal year, provide estimates of advisory billings for that year and state that the percentages are estimates.)

B. Does applicant call any of the services it checked above financial planning or some similar term? ..... Yes ☐ No ☐

C. Applicant offers investment advisory services for: (check all that apply)

- ☐ (1) A percentage of assets under management
- ☒ (2) Hourly charges
- ☐ (3) Fixed fees (not including subscription fees)
- ☐ (4) Subscription fees
- ☐ (5) Commissions
- ☐ (6) Other

D. For each checked box in A above, describe on Schedule F:

- the services provided, including the name of any publication or report issued by the adviser on a subscription basis or for a fee
- applicant's basic fee schedule, how fees are charged and whether its fees are negotiable
- when compensation is payable, and if compensation is payable before service is provided, how a client may get a refund or may terminate an investment advisory contract before its expiration date

2. **Types of Clients** — Applicant generally provides investment advice to: (check those that apply)

- ☐ A. Individuals
- ☐ B. Banks or thrift institutions
- ☐ C. Investment companies
- ☐ D. Pension and profit sharing plans
- ☐ E. Trusts, estates, or charitable organizations
- ☐ F. Corporations or business entities other than those listed above
- ☐ G. Other (describe on Schedule F)

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

3. **Types of Investments.** Applicant offers advice on the following: (check those that apply)

- ☐ A. Equity Securities
  - ☐ (1) exchange-listed securities
  - ☐ (2) securities traded over-the-counter
  - ☐ (3) foreign issuers
- ☐ B. Warrants
- ☐ C. Corporate debt securities (other than commercial paper)
- ☐ D. Commercial paper
- ☐ E. Certificates of deposit
- ☐ F. Municipal securities
- G. Investment company securities:
  - ☐ (1) variable life insurance
  - ☐ (2) variable annuities
  - ☐ (3) mutual fund shares
- ☐ H. Unites States government securities
- I. Options contracts on:
  - ☐ (1) securities
  - ☐ (2) commodities
- J. Futures contracts on:
  - ☐ (1) tangibles
  - ☐ (2) intangibles
- K. Interests in partnerships investing in:
  - ☐ (1) real estate
  - ☐ (2) oil and gas interests
  - ☐ (3) other (explain on Schedule F)
- ☐ L. Other (explain on Schedule F)

4. **Methods of Analysis, Sources of Information, and Investment Strategies.**

A. Applicant's security analysis methods include: (check those that apply)

- (1) ☐ Charting
- (2) ☐ Fundamental
- (3) ☐ Technical
- (4) ☐ Cyclical
- (5) ☐ Other (explain on Schedule F)

B. The main sources of information applicant uses include: (check those that apply)

- (1) ☐ Financial newspapers and magazines
- (2) ☐ Inspections of corporate activities
- (3) ☐ Research materials prepared by others
- (4) ☐ Corporate rating services
- (5) ☐ Timing services
- (6) ☐ Annual reports, prospectuses, filings with the Securities and Exchange Commission
- (7) ☐ Company press releases
- (8) ☐ Other (explain on Schedule F)

C. The investment strategies used to implement any investment advice given to clients include: (check those that apply)

- (1) ☐ Long term purchases (securities held at least a year)
- (2) ☐ Short term purchases (securities sold within a year)
- (3) ☐ Trading (securities sold within 30 days)
- (4) ☐ Short sales
- (5) ☐ Margin transactions
- (6) ☐ Option writing, including covered options, uncovered options or spreading strategies
- (7) ☐ Other (explain on Schedule F)

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

5. Education and Business Standards.

Are there any general standards of education or business experience that applicant requires of those involved in determining or giving investment advice to clients? ..... Yes ☐ No ☐

(If yes, describe these standards on Schedule F.)

6. Education and Business Background.

For:

- each member of the investment committee or group that determines general investment advice to be given to clients, or
- if the applicant has no investment committee or group, each individual who determines general investment advice given to clients (if more than five, respond only for their supervisors)
- each principal executive officer of applicant or each person with similar status or performing similar functions.

On Schedule F, give the:

- name
- year of birth
- formal education after high school
- business background for the preceding five years

7. Other Business Activities. (check those that apply)

☐ A. Applicant is actively engaged in a business other than giving investment advice.

☐ B. Applicant sells products or services other than investment advice to clients.

☐ C. The principal business of applicant or its principal executive officers involves something other than providing investment advice.

(For each checked box describe the other activities, including the time spent on them, on Schedule F.)

8. Other Financial Industry Activities or Affiliations. (check those that apply)

☐ A. Applicant is registered (or has an application pending) as a securities broker-dealer.

☐ B. Applicant is registered (or has an application pending) as a futures commission merchant, commodity pool operator or commodity trading adviser.

C. Applicant has arrangements that are material to its advisory business or its clients with a related person who is a:

☐ (1) broker-dealer
☐ (2) investment company
☐ (3) other investment adviser
☐ (4) financial planning firm
☐ (5) commodity pool operator, commodity trading adviser or futures commission merchant
☐ (6) banking or thrift institution
☐ (7) accounting firm
☐ (8) law firm
☐ (9) insurance company or agency
☐ (10) pension consultant
☐ (11) real estate broker or dealer
☐ (12) entity that creates or packages limited partnerships

(For each checked box in C, on Schedule F identify the related person and describe the relationship and the arrangements.)

D. Is applicant or a related person a general partner in any partnership in which clients are solicited to invest? ..... Yes ☐ No ☐

(If yes, describe on Schedule F the partnerships and what they invest in.)

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

9. Participation or Interest in Client Transactions.

Applicant or a related person: (check those that apply)

☐ A. As principal, buys securities for itself from or sells securities it owns to any client.

☐ B. As broker or agent effects securities transactions for compensation for any client.

☐ C. As broker or agent for any person other than a client effects transactions in which client securities are sold to or bought from a brokerage customer.

☐ D. Recommends to clients that they buy or sell securities or investment products in which the applicant or a related person has some financial interest.

☐ E. Buys or sells for itself securities that it also recommends to clients.

(For each box checked, describe on Schedule F when the applicant or a related person engages in these transactions and what restrictions, internal procedures, or disclosures are used for conflicts of interest in those transactions.)

10. Conditions for Managing Accounts. Does the applicant provide investment supervisory services, manage investment advisory accounts or hold itself out as providing financial planning or some similarly termed services *and* impose a minimum dollar value of assets or other conditions for starting or maintaining an account? ..... Yes ☐ No ☐

(If yes, describe on Schedule F.)

11. Review of Accounts. If applicant provides investment supervisory services, manages investment advisory accounts, or holds itself out as providing financial planning or some similarly termed services:

A. Describe below the reviews and reviewers of the accounts. **For reviews**, include their frequency, different levels, and triggering factors. **For reviewers**, include the number of reviewers, their titles and functions, instructions they receive from applicant on performing reviews, and number of accounts assigned each.

B. Describe below the nature and frequency of regular reports to clients on their accounts.

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Applicant:	SEC File Number: 801-	Date:

12. **Investment or Brokerage Discretion.**

A. Does applicant or any related person have authority to determine, without obtaining specific client consent, the:

	Yes	No
(1) securities to be bought or sold?	☐	☐
(2) amount of the securities to be bought or sold?	☐	☐
(3) broker or dealer to be used?	☐	☐
(4) commission rates paid?	☐	☐

B. Does applicant or a related person suggest brokers to clients? Yes ☐ No ☐

For each yes answer to A describe on Schedule F any limitations on the authority. For each yes to A(3), A(4) or B, describe on Schedule F the factors considered in selecting brokers and determining the reasonableness of their commissions. If the value of products, research and services given to the applicant or a related person is a factor, describe:

- the products, research and services
- whether clients may pay commissions higher than those obtainable from other brokers in return for those products and services
- whether research is used to service all of applicant's accounts or just those accounts paying for it; and
- any procedures the applicant used during the last fiscal year to direct client transactions to a particular broker in return for products and research services received.

13. **Additional Compensation.**

Does the applicant or a related person have any arrangements, oral or in writing, where it:

	Yes	No
A. is paid cash by or receives some economic benefit (including commissions, equipment or non-research services) from a non-client in connection with giving advice to clients?	☐	☐
B. directly or indirectly compensates any person for client referrals?	☐	☐

(For each yes, describe the arrangements on Schedule F.

14. **Balance Sheet.** Applicant must provide a balance sheet for the most recent fiscal year on Schedule G if applicant:

- has custody of client funds or securities; or
- requires prepayment of more than $500 in fees per client and 6 or more months in advance

Has applicant provided a Schedule G balance sheet? Yes ☐ No ☐

Answer all items. Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule A of Form ADV FOR CORPORATIONS	Applicant:	SEC File Number: 801-	Date:	Official Use

(Answers for Form ADV Part I Item 8.)

1. This Schedule requests information on the owners and executive officers of the applicant.

2. Please complete for:

   (a) each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, director, and individuals with similar status or functions, and

   (b) every person who is directly, or indirectly through intermediaries, the beneficial owner of 5% or more of any class of equity security of the applicant.

3. If a person covered by 2(b) above owns applicant indirectly through intermediaries, list all intermediaries and below them, if they are not subject to Sections 12 or 15(d) of the Securities Exchange Act of 1934 but are:

   (a) corporations, give their shareholders who own 5% or more of a class of equity security, or

   (b) partnerships, give their general partners or any limited and special partners who have contributed 5% or more of the partnership's capital.

4. If the intermediary's shareholders or partners listed under 3 above are not individuals, continue up the chain of ownership listing their 5% shareholders, general partners, and 5% limited or special partners until individuals are listed.

5. Ownership codes are: NA - 0 up to 5% | A - 5% up to 10% | B - 10% up to 25% | C - 25% up to 50% | D - 50% up to 75% | E - 75% up to 100%

6. Asterisk (*) names reporting a change in title, status, stock ownership or partnership interest or control. Double asterisk (**) names new on this filing.

7. Check "Control Person" column *if person has "control" as defined in the instructions to this Form.*

FULL NAME Last	First	Middle	Beginning Date Month	Year	Title or Status	Ownership Code	Control Person	CRD No., or, if none Social Security Number	OFFICIAL USE ONLY

List below names reported on the most recent previous filing under this item that are being DELETED:

FULL NAME Last	First	Middle	Ending Date Month	Year	CRD. No., or, if none Social Security Number

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule B of Form ADV FOR PARTNERSHIPS	Applicant:	SEC File Number: 801-	Date:	Official Use

(Answers for Form ADV Part I Item 8.)

1. This Schedule requests information on the owners and partners of the applicant.

2. Please complete for all general partners and with respect to limited and special partners all those who have contributed directly or indirectly through intermediaries, 5% or more of the partnership's capital.

3. If a person owns applicant indirectly through intermediaries, list all intermediaries and below them, if they are not subject to Sections 12 or 15(d) of the Securities Exchange Act of 1934 but are:

   (a) corporations, give their shareholders who own 5% or more of a class of equity security, or

   (b) partnerships, give their general partners or any limited and special partners who have contributed 5% or more of the partnership's capital.

4. If the intermediary's shareholders or partners listed under 3 above are not individuals, continue up the chain of ownership listing their 5% shareholders, general partners, and 5% limited or special partners until individuals are listed.

5. Ownership codes are: NA - 0 up to 5% A - 5% up to 10% B - 10% up to 25% C - 25% up to 50% D - 50% up to 75% E - 75% up to 100%

6. Asterisk (*) names reporting a change in title, status, stock ownership or partnership interest or control. Double asterisk (**) names new on this filing.

7. Check "Control Person" column if person has "control" as defined in the instructions to this Form.

FULL NAME Last	First	Middle	Beginning Date Month	Year	Title or Status	Ownership Code	Control Person	CRD No., or, if none Social Security Number	OFFICIAL USE ONLY

List below names reported on the most recent previous filing under this item that are being DELETED:

FULL NAME Last	First	Middle	Ending Date Month	Year	CRD No., or, if none Social Security Number

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule C of Form ADV for OTHER THAN Partnerships and Corporations

Applicant:	SEC File Number: 801-	Date:	Official Use

(Answers for Form ADV Part I Item 8.)

1. This Schedule requests information on the owners and executive officers of the applicant.
2. Please complete for each person, including trustees, who participates in directing or managing the applicant.
3. Give each listed person's title or status, and describe the person's authority and beneficial interest in applicant. Sole proprietors must be identified in the "Title or Status" column.
4. Astrisk (*) names reporting a change in title, status, stock ownership or partnership interest. Double asterisk (**) names new on this filing.

FULL NAME Last	First	Middle	RELATIONSHIP Beginning Date Month	Year	Title or Status	CRD No., or, if none Social Security Number	Description of Authority and Beneficial Interest

List below names reported on the most recent previous filing under this item that are being DELETED:

FULL NAME Last	First	Middle	Ending Date Month	Year	CRD No., or, if none Social Security Number

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule D of Form ADV Page 1	Applicant:	SEC File Number: 801-	Date:

(Answers for Form ADV Part I Items 11 and 12.)

This Schedule is submitted for an individual who is: (Check all boxes that apply)

☐ A. the applicant, named in Part I Item 1A

☐ B. a control person, named in Part I Item 10A

☐ C. an owner of at least 10% of a class of applicant's equity securities

☐ D. an officer or director, partner, or individual with similar status of applicant, described in Schedule A Item 2a, Schedule B Item 2, or Schedule C Item 2

☐ E. a member of the applicant's investment committee that determines general investment advice to be given to clients

☐ F. if applicant has no investment committee, an individual who determines general client advice (if more than five, complete for their supervisors only)

☐ G. an individual giving investment advice on behalf of the applicant in the jurisdictions checked below:

AL ___ AK ___ AZ ___ AR ___ CA ___ CO ___ CT ___ DE ___ DC ___ FL ___ GA ___ HI ___ ID ___
IL ___ IN ___ IA ___ KS ___ KY ___ LA ___ ME ___ MD ___ MA ___ MI ___ MN ___ MS ___ MO ___
MT ___ NE ___ NV ___ NH ___ NJ ___ NM ___ NY ___ NC ___ ND ___ OH ___ OK ___ OR ___ PA ___
RI ___ SC ___ SD ___ TN ___ TX ___ UT ___ VT ___ VA ___ WA ___ WV ___ WI ___ WY ___ Puerto Rico ___
Other: _____
(Specify)

☐ H. involved in any yes answer to the disciplinary question, Part I Item 11.

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule D of Form ADV Page 2	Applicant:	SEC File Number: 801-	Date:

(Answers for Form ADV Part I Items 11 and 12.)

1. Applicant investment adviser: (see Part I Item 1A)			IRS Empl. Ident. No.:
2. Individual's full name for whom this Schedule is being completed:	Social Security Number:	CRD No., if any:	IRS Empl. Ident. No.:

3. (a) Residence of individual: (Number and Street) (City) (State) (Zip Code)

(b) Birth Date:	(c) City:	(d) State or Province:	(e) Country:

4. NAMES USED. List all names other than the one given in Item 2 above that the individual has used, including maiden names.
(Last) (First) (Middle)

5. EDUCATION. Start with last high school attended. If no degree received, state "none."

School: (Name, City and State)	Years Attended	Year Graduated	For College and above Degree	Major

6. BUSINESS BACKGROUND. Provide complete consecutive statement of all employment for the past ten years, beginning with the most recent position first.

Name of Firm and Address	Kind of Business	Exact Nature of Connection or Employment	Beginning Date Month	Beginning Date Year	Ending Date Month	Ending Date Year

7. EXAMINATIONS/PROFESSIONAL DESIGNATIONS. List all jurisdiction, self-regulatory organization, and professional examinations and designations. Give examination or designation name (include any examination's title and number), body giving it, and date taken or conferred. If examination was waived, give details.

8. PROCEEDINGS. For each 'yes' answer to Part I Item 11 involving the individual, give the following details of any court or regulatory action:

- the adviser and individuals named,
- the title and date of the action,
- the court or body taking the action, and
- a description of the action

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule E of Form ADV Continuation Sheet for Form ADV Part I	Applicant:	SEC File Number: 801-	Date:

(Do not use this Schedule as a continuation sheet for Form ADV Part II or any other schedules.)

1. Full name of applicant exactly as stated in Item 1A of Part I of Form ADV:	IRS Empl. Ident. No.:

Item of Form (identify)	Answer

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule F of Form ADV Continuation Sheet for Form ADV Part II	Applicant:	SEC File Number: 801-	Date:

(Do not use this Schedule as a continuation sheet for Form ADV Part I or any other schedules.)

1. Full name of applicant exactly as stated in Item 1A of Part I of Form ADV:	IRS Empl. Ident. No.:

Item of Form (identify)	Answer

Complete amended pages in full, circle amended items and file with execution page (page 1).

Schedule G of Form ADV Balance Sheet	Applicant:	SEC File Number: 801-	Date:

(Answers in Response to Item 4 of Form ADV-S, or Form ADV Part II Item 14.)

1. Full name of applicant exactly as stated in Item 1A of Part I of Form ADV:	IRS Empl. Ident. No.:

Instructions

1. The balance sheet must be:

   A. Prepared in accordance with generally accepted accounting principles

   B. Audited by an independent public accountant

   C. Accompanied by a note stating the principles used to prepare it, the basis of included securities, and any other explanations required for clarity.

2. Securities included at cost should show their market or fair value parenthetically.

3. Qualifications and any accompanying independent accountant's report must conform to Article 2 of Regulation S-X (17 CFR 210.2-01 et seq.).

4. Sole proprietor investment advisers:

   A. Must show investment advisory business assets and liabilities separate from other business and personal assets and liabilities

   B. May aggregate other business and personal assets and liabilities unless there is an asset deficiency in the total financial position.

Complete amended pages in full, circle amended items and file with execution page (page 1).

Appendix F

Interpretive Positions of the SEC Regarding Form ADV

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-1000]

AGENCY: Securities and Exchange Commission.

ACTION: Statement of staff interpretive position regarding certain rules and forms.

SUMMARY: The Commission is publishing, in question and answer form, certain interpretive positions of the staff of its Division of Investment Management regarding Form ADV and other reporting and disclosure requirements applicable to investment advisers under the Investment Advisers Act of 1940. The purpose of this release is to: (i) update a previous release which set forth staff positions regarding adviser registration and annual reporting requirements and (ii) provide guidance regarding recently adopted revisions to Form ADV.

FOR FURTHER INFORMATION CONTACT: Jay Gould, Division of Investment Management, (202) 272-2107, Room 5135, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

On October 15, 1985, the Commission adopted revisions to Form ADV, the registration form for investment advisers under the Investment Advisers Act of 1940,[1] to make the form a uniform form for advisers registering with the Commission and the forty jurisdictions which require investment advisers to register. Uniform Form ADV was developed jointly by the Commission and the North American Securities Administrators Association, Inc. ("NASAA"), based on Form ADV as adopted by the Commission in 1979, and amended in 1982 and 1983.[2] Uniform Form ADV will be effective on January 1, 1986. Advisers registered with the Commission on January 1, 1986 will be required to amend their registrations by filing the new form by March 31, 1986. Registrants are referred to IA Rel. No. 991 for further information concerning the filing requirements for the new form.

In 1981, the Commission published a question and answer release containing staff views concerning Form ADV and related registration and reporting requirements.[3] The purpose of the release was to provide guidance to registrants in complying with these requirements. While the release continues to be useful, portions of it now are out of date. The release published today revises IA Rel. No. 767 to reflect changes made in Form ADV and provide certain additional guidance concerning the new form. Three new questions have been added to incorporate positions developed by the staff in recent years on custody and to provide guidance to registrants in calculating clients under new Items 17B and 20A of uniform Form ADV and employees under Item 17A. Upon publication of this release, IA Rel. No. 767 is rescinded.

II. CERTAIN STAFF INTERPRETIVE POSITIONS REGARDING INVESTMENT ADVISER DISCLOSURE AND REPORTING REQUIREMENTS

A. Rule 204-1

1. Fiscal Year

Question: Paragraphs (b) and (c) of Rule 204-1 [17 CFR 275.204-1(b) and (c)] require that, within 90 days of the end of its fiscal year, a registered investment adviser make certain amendments to its Form ADV and file an annual report on Form ADV-S. For the purposes of these requirements, may an investment adviser treat as its fiscal year an accounting period other than a calendar year or the period used for reporting income taxes?

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[1] IA Rel. No. 991 (October 15, 1985) [50 FR 42903 (October 23, 1985)].

[2] IA Rel. No. 664 (January 30, 1979) [44 FR 7370 (February 7, 1979)];
IA Rel. No. 805 (May 14, 1982) [47 FR 22505 (May 25, 1982)];
IA Rel. No. 840 (February 28, 1983) [48 FR 9521 (March 7, 1983)].

[3] IA Rel. No. 767 (July 21, 1981) [46 FR 38496 (July 28, 1981)].

Response: Yes. An adviser may use any twelve month accounting period, provided that the period is fixed or determinable and consistently used by the adviser. The term "fiscal year" is not defined in the Advisers Act or in the rules or forms thereunder, but, as commonly used, the term refers to a twelve month accounting period. For the purposes of paragraphs (b) and (c) of Rule 204-1, an investment adviser is not necessarily limited to a calendar year or the accounting period used for income tax purposes. For example, an investment adviser that is also registered with the Commission as a broker-dealer may elect to use the same accounting period used in filing financial statements under Rule 17a-5(d) [17 CFR 240.17a-5(d)] under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] ("Exchange Act"), provided that this period satisfies the conditions described above, even though a different accounting period might be used for income tax purposes.

2. ADV-S in Lieu of Amendments

Question: Paragraph (c) of Rule 204-1 requires a registered investment adviser to file an annual report on Form ADV-S within 90 days of the end of its fiscal year unless its registration has been withdrawn, cancelled or revoked prior to that date. Can Form ADV-S also be used to amend Form ADV?

Response: No. Form ADV-S is a separate form which must be filed independently of Form ADV or any amendments thereto. Amendments to Form ADV must be filed in accordance with the provisions of paragraph (b) of Rule 204-1. Even if an amendment to Form ADV is filed concurrently with the Form ADV-S filing, it must meet all the requirements applicable to amendments filed separately. Amendments should not be attached to Form ADV-S.

B. The Brochure Rule

1. Separate Brochure

Question: Paragraph (a) of the Brochure Rule [17 CFR 275.204-3(a)] requires certain investment advisers subject to registration under the Advisers Act to furnish clients and prospective clients with a written disclosure statement, which may be either a copy of Part II of an adviser's Form ADV or a separate written document ("brochure") "containing at least the information * * * required by Part II of Form ADV." For purposes of Rule 204-3(a), if an investment adviser uses a separate brochure, rather than a copy of Part II of its Form ADV, may the adviser omit from the brochure (i) the cautionary legend on page 1 of Part II of Form ADV (which states that the Commission has not approved the information contained in Part II) and (ii) negative responses to items in Part II?

Response: In the view of the staff, the cautionary legend on page 1 of Part II of Form ADV is not "information * * * required" by that part within the meaning of paragraph (a) of the Brochure Rule and, therefore, is not required to be included in any brochure used by an adviser. However, consistent with its obligations under the antifraud provisions of Section 206[15 U.S.C. 80b-6] and the provisions of Section 208(a)[15 U.S.C. 80b-8(a)] of the Advisers Act,[4] an investment adviser should not make any representation, expressed or implied, that the Commission has approved either the information in the brochure or the investment adviser's qualifications or business practices.

Whether an investment adviser may omit from its brochure a negative response to any item in Part II of its Form ADV depends on the particular item and whether the "negative" response is material information which should be disclosed to any advisory client. For example, Item 3 of Part II requires an investment adviser to indicate on a checklist whether or not it provides advice with respect to certain types of securities enumerated in that item. A separate brochure used by an adviser which lists specific types of securities as to which the adviser gives advice generally would not have to disclose the types of securities about which the adviser does not provide advice, unless this disclosure was otherwise material. On the other hand, for example, a negative response to Item 5 of Part II, which would indicate that the adviser does not require its associated persons to meet any general standards of education or business background, should be disclosed in a brochure.

2. Termination Without Penalty

Question: Pursuant to paragraph (b)(1)(ii) of the Brochure Rule [17 CFR 275.204-3(b)(1)(ii)], an investment adviser may delay delivering its written disclosure statement to prospective clients until the time of entering into an advisory contract, if the client has a right to terminate the contract "without penalty" within five business days. Does a fee charged by an adviser for advisory services provided to a client who terminates its advisory contract within the five business day period constitute a "penalty?"

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[4] Section 208(a) provides that "it shall be unlawful for any person registered under Section 203 of (the Advisers Act) to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof."

Response: No. A pro-rata charge for bona fide advisory services actually rendered during this five day period would not be deemed to be a "penalty" for the purposes of the Brochure Rule. However, a separate charge for "start-up" expenses normally would be considered a penalty within the meaning of the Brochure Rule.

3. Time of Annual Offer or Delivery

Question: Paragraph (c)(1) of the Brochure Rule [17 CFR 275.204-3(c)(1)] requires an investment adviser, annually, and without charge, either to deliver a written disclosure statement to its existing advisory clients or to offer, in writing, to deliver the statement upon written request from the client. Must an adviser make the annual offer to deliver, or actual delivery, on the specific anniversary date of each individual advisory client's contract?

Response: No. Paragraph (c)(1) of the Brochure Rule does not prohibit an adviser from making the required delivery or offer to some or all of its clients simultaneously, regardless of the date on which the advisory contract became effective, provided that the adviser offers to deliver, or actually delivers to advisory clients, a then current written disclosure statement at least once every 12 months. An adviser might, for example, establish a practice of making the offer or delivery required by paragraph (c)(1) at the beginning of the calendar year. If this is going to be the only time during the year that an offer or delivery will be made, then it should be made to every client, including those who initially contracted with the adviser during the preceding year. An adviser may include the offer or delivery in a client billing or other routine correspondence.

C. Form ADV, Part I

1. Amending for Change in Form of Organization or State of Incorporation

Question: If an investment adviser changes its form of business organization (from a sole proprietorship to a corporation, for example) or its state of incorporation, must the adviser file a new application for registration on Form ADV, or may the change in business organization merely be reflected as an amendment to the adviser's existing Form ADV?

Response: Section 203(g) of the Advisers Act [15 U.S.C. 80b-3(g)] provides that a successor to the business of an investment adviser registered under the Advisers Act shall be deemed likewise registered, if it files an application for registration within thirty days from the date it succeeded to the business of the adviser, unless and until the Commission denies, revokes or suspends the registration of the successor adviser. A change in the form of an investment adviser's business organization generally would involve the creation of a new legal entity and Section 203(g) would require the new entity to file a new or successor application for registration on Form ADV.

Rule 203-1 [17 CFR 275.203-1] under the Advisers Act permits an adviser to file an amendment on Form ADV to reflect a change in the adviser's state of incorporation or form of organization which will be deemed to be an application for registration, even though it is filed as an amendment. The adviser is required, however, to file the amendment within thirty days of the date of the succession and to pay the $150 registration fee for the new or successor registration. If the adviser files its successor application as a new application rather than as an amendment, it also must file Form ADV-W to withdraw the registration of the predecessor adviser.

It should be noted that a change in an investment adviser's form of business generally would involve the "assignment" of advisory contracts to the successor adviser within the meaning of Section 205(2) of the Advisers Act [15 U.S.C. 80b-5(2)]. That section, in effect, prohibits an investment adviser that is subject to registration under the Advisers Act from assigning an advisory contract without the consent of the other party to the contract. Accordingly, the consent of clients to the assignment of their advisory contracts to the successor adviser would be required.

2. Time for Filing Successor Application

Question: Section 203(g) of the Advisers Act authorizes a successor to the business of an investment adviser to file an application for investment adviser registration within 30 days after the succession. As an alternative, may the person file a Form ADV prior to the succession?

Response: Yes. Section 203(c) of the Advisers Act [15 U.S.C. 80b-3(c)] authorizes an investment adviser, or any person who presently contemplates becoming an investment adviser, to file an application for registration with the Commission. Accordingly, a person who intends to succeed to the business of an investment adviser, and who, therefore, presumably contemplates becoming an investment adviser, may file a Form ADV prior to the succession.

3. Number of Employees

Question: Item 17A requires an adviser to indicate the number of employees who perform investment advisory functions for the adviser. In responding, when should an adviser count "owner-employees" and "independent contractors?"

Response: The term "employee" is not defined in the Advisers Act. Employees are included among the persons who are "person[s] associated with an investment adviser" as defined in Section 202(a)(17) [15 U.S.C. 80b-2(a)(17)] of the Advisers Act. The staff interprets the term employee to include independent contractors whose activities are controlled by the investment adviser.[5] An independent contractor is subject to the control of an employer if their relationship is one of principal and agent or master and servant. Accordingly, in responding to Item 17A of Form ADV an adviser should count among its employees any persons, including those denoted "independent contractors," performing investment advisory functions for the adviser whose activities are controlled by the adviser. Any "owner-employee" performing investment advisory functions for the adviser also should be counted.

4. Number of Clients

Question: In calculating the number of clients to whom the applicant provided advisory services during the last fiscal year in Items 17B and 20A of Form ADV, should "clients" who have paid no fee in that fiscal year be counted?

Response: An adviser who provides investment advice to a person should count that person as a client for the fiscal year in which the services were provided. If a person prepays its advisory fee in one year and receives services on an ongoing basis during the following year, the adviser should count that person as a client for the year payment was received and for every year services were provided. If an adviser charges for services after they are rendered, a person who receives advisory services in the latter part of one fiscal year but is not billed until the following fiscal year should be counted as a client in both years, if services were provided in each year.

A client who receives advisory services on an ongoing basis, should be counted as a client every year services are provided irrespective of when payment is received. In the staff's view an adviser would violate Section 208(d)[6] of the Advisers Act if the adviser either required prepayment of fees in a fiscal year or deferred payment of fees until the next fiscal year in order to avoid registration or reporting requirements under the Act.

5. Automatic Payment of Advisory Fees Deemed Custody

Question: If an adviser bills its client's account by sending the bill directly to the custodian holding the client's funds and securities, does the adviser have custody for purposes of Rule 206(4)-2 [17 CFR 275.206(4)-2] and Form ADV Part I, Item 13?

Response: Generally, the staff's position is that a person has custody if it directly or indirectly holds client funds or securities, has any authority to obtain possession of them or has the ability to appropriate them. Accordingly, an adviser may be deemed to have custody where the adviser is paid automatically from client funds upon presentation of a bill to the custodian of the client's account. The staff takes the position that the adviser will not be deemed to have custody under these circumstances, however, if (1) the client provides written authorization permitting the adviser's fees to be paid directly from the client's account held by an independent custodian, (2) the adviser sends to the client and the custodian at the same time, a bill showing the amount of the fee, the value of the client's assets on which the fee was based, and the specific manner in which the adviser's fee was calculated, and (3) the custodian agrees to send to the client a statement, at least quarterly, indicating all amounts disbursed from the account including the amount of advisory fees paid directly to the adviser.[7]

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[5] This is consistent with the Commission's long-standing interpretation of the status of independent contractors as employees of broker-dealers under the Exchange Act. *See* letter to Gordon S. Macklin, President, National Association of Securities Dealers, from Douglas Scarff, Director, Division of Market Regulation, (available July 18, 1982). To the extent that an independent contractor performed investment advisory functions for an investment adviser but was not under the control of that adviser, the independent contractor's activities would require the independent contractor to be separately registered as an adviser with the Commission.

[6] Section 208(d) [15 U.S.C. 80b-8(d)] provides that, "It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder."

[7] *See* Lawwill Sena & Weller Inc. (pub. avail. April 11, 1983). This position was first established in Investment Counsel Association of America, Inc. (pub. avail. July 9, 1982).

D. Form ADV, Part II

1. Filing Part II When Exempt From Brochure Rule

Question: Is an investment adviser whose contracts are exempt from the Brochure Rule's delivery requirements — for example, an investment adviser to an investment company or an investment adviser providing only impersonal advisory services — required to complete Part II of Form ADV?

Response: Yes. Although the Brochure Rule exempts from the disclosure statement delivery requirements investment advisers that provide certain types of services, the rule does not exempt them from the requirements of Section 203(c) under the Advisers Act and Rule 203-1 thereunder [17 CFR 275.203-1] regarding the requirements for filing both parts of Form ADV.

2. Negotiable Fee Schedules

Question: In response to Item 1 of Part II, may an investment adviser which charges for its services in accordance with a fee schedule, but which also permits negotiation of fees, simply set forth the basic fee schedule and state that its fees are negotiable, or must the adviser disclose the range within which fees can be negotiated?

Response: The extent of disclosure required by Item 1 of Part II concerning the adviser's fees will depend on the facts and circumstances. As a general matter, if an adviser's usual fees are negotiable, but only within a range, the adviser would have to disclose his basic fee schedule, as well as the range within which fees can be negotiated. On the other hand, if fees are negotiable, but no particular range has been established either explicitly or by practice, a general statement that fees are negotiable, together with the inclusion of the basic fee schedule, generally would be adequate.

3. Discretion Over Commission Rates

Question: If an investment adviser exercises discretion as to the commission rates at which securities transactions for client accounts are effected, must it, in response to Item 1 of Part II, disclose the commission rates charged client accounts, as well as its advisory fees?

Response: An adviser exercising brokerage discretion for client accounts generally would not have to disclose, in response to Item 1 of Part II, the commission rates at which securities transactions are effected for client accounts unless these charges form the basis, in whole or in part, for the adviser's compensation. The investment adviser, however, would have to describe in detail, in response to Item 12 of Part II, its brokerage placement practices.

4. Disclosure of Background and Business Practices for New Advisers

Question: If an applicant for registration is a person who has not previously engaged in the advisory business, must the applicant complete Part II of Form ADV, which requires information as to the background and business practices of an adviser?

Response: Yes. All applicants for registration as an investment adviser must complete fully Form ADV, including Parts I and II. An applicant who is new to the advisory business, should respond to the various items in Part II in light of the advisory services the adviser *intends* to provide, being careful to make clear the prospective nature of the advisory activities so as not to make any misleading statements.

5. Investment Supervisory Services and Management not Involving Investment Supervisory Services

Question: What is the difference between providing "investment supervisory services" as defined in Item 1A(1) of Part II and "manag[ing] investment advisory accounts not involving investment supervisory services" within the meaning of Item 1A(2) of Part II?

Response: "Investment supervisory services," as used in Item 1A(1), means the giving of continuous advice to clients as to the investment of funds on the basis of the individual needs of each client.[8] On the other hand, Item 1A(2) refers to the management of accounts where either the individual needs of the clients are not considered or where the

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[8] This definition is incorporated from Section 202(a)(13) of the Advisers Act [15 U.S.C. 80b-2(a)(13)].

management services are not continuous. An example of an advisory service which would be covered by Item 1A(2), and not by Item 1A(1), would be an account management service provided only with respect to a particular class of securities owned by a client (e.g., options) where it is understood that the adviser will not consider the individual needs of a particular client as distinct from the needs of any other client.

6. Use of Schedule D to Disclose Business Background

Question: Item 6 of Part II of Form ADV requires an investment adviser to provide certain information concerning the education and business background of its principal executive officers, and each member of the adviser's investment committee, or those persons who determine or approve the investment advice given by the adviser. May an investment adviser make reference to Schedule D of Form ADV which requires, in part, the same information required by Item 6, rather than setting forth that information in full in response to Item 6 itself?

Response: Item 6 may be answered by reference to Schedule D. However, in furnishing this information to an advisory client or prospective advisory client pursuant to the Brochure Rule, a reference to Schedule D is adequate only if the schedule is furnished, together with a copy of Part II of the adviser's Form ADV, or is included as part of a brochure, and the presentation of the information in that manner is not otherwise misleading.

7. Broker-Dealer Registration

Question: Item 8A of Part II requires an investment adviser to disclose whether it is registered as a broker-dealer. Is this item intended to encompass registrations as a broker-dealer in other jurisdictions, such as the states, as well as with the Commission?

Response: Yes. Item 8A covers broker-dealer registrations in other jurisdictions. Therefore, if an investment adviser is registered as a broker-dealer in a state but not under the Exchange Act, the adviser should respond affirmatively to Item 8A.

8. Adviser Brokerage Discretion

Question: Item 9B of Part II asks whether the applicant "effects" securities transactions for compensation as a broker or agent for any investment advisory client. Certain investment advisers have discretionary authority to place orders with brokers to execute securities transactions for client accounts but do not receive any specific compensation or commission for this function. However, they do receive an advisory fee for the services provided which include exercising discretionary brokerage authority. Would this activity constitute "effecting" a transaction in securities?

Response: For the purposes of Item 9B, an adviser that is vested with brokerage placement discretion by its clients, but that does not execute transactions in securities for clients and does not receive any specific compensation in connection with securities transactions for clients would not, in the view of the staff, be deemed to be "effecting" securities transactions for client accounts solely by virtue of this activity. It should be noted that Item 12 of Part II calls for disclosure about brokerage discretion.

9. Account Reviews

Question: Does the account review process required to be described in response to Item 11 of Part II refer only to internal review procedures used by an investment adviser, or does it also refer to an account review conducted by a third party?

Response: Item 11 is intended to cover all procedures, including internal and external ones, employed by an investment adviser in connection with the review and evaluation of client accounts.

E. Balance Sheet Requirement: Item 14 of Part II of Form ADV

1. Accounting Method for Balance Sheet

Question: Must the balance sheet filed pursuant to Item 14 of Part II be prepared on a cash basis or on an accrual basis? If the balance sheet is required to be prepared on an accrual basis, must all of the adviser's internal books and records also be prepared on an accrual basis?

Response: As specified in Item 14 of Part II, the required balance sheet must be prepared in accordance with generally accepted accounting principles, which require that, among other things, the balance sheet be prepared on an accrual basis. An investment adviser's internal books and records may be maintained on either a cash or accrual basis, provided that the adviser maintains the books and records necessary to reconcile the adviser's cash accounts (as shown on its internal books and records) with the corresponding accounts on the balance sheet as restated and presented on an accrual basis.

2. Balance Sheet Preparation for New Registrant

Question: If the applicant is a newly formed corporation or partnership subject to the balance sheet requirement of Part II Item 14, and is just commencing business as an investment adviser, it will have no prior fiscal year end for which to file a balance sheet. If the applicant is such a company or if it is a sole proprietorship which has not previously engaged in business as an investment adviser, how should it respond to Item 14 of Part II of Form ADV?

Response: If an applicant subject to the balance sheet requirement of Part II Item 14 has had no prior fiscal year end for which to file a balance sheet or is a sole proprietor who has not previously engaged in business as an investment adviser, no balance sheet is required to be filed. However, the adviser is required to amend its Form ADV by filing a balance sheet in response to Item 14 of Part II within 90 days after the end of its first fiscal year, and each fiscal year thereafter, as required by paragraph (b) of Rule 204-1.

3. Balance Sheet Required When Adviser Has Custody

Question: Item 14 requires the filing of an audited balance sheet if the adviser has custody or possession of clients' funds or securities or requires the prepayment of advisory fees six months or more in advance and in excess of $500 per client. If an adviser has custody or possession, or requires prepayment of fees, with respect to only a few of its clients, must the adviser nonetheless file an audited balance sheet in response to Item 14 of Part II?

Response: Yes. However, the audited balance sheet may be omitted from a brochure provided to a client as to whom the adviser does not have custody or possession of client funds or securities or does not require prepayment of fees of more than $500 and for more than six months in advance.

4. Balance Sheet Required When Registrant is a Subsidiary

Question: Can a wholly owned investment adviser subsidiary satisfy the balance sheet requirements of Item 14 of Part II by filing its parent corporation's consolidated balance sheet?

Response: No. A balance sheet for the actual registrant must be filed.

5. Balance Sheet Required When Affiliate Has Custody

Question: If an investment adviser is deemed to have custody or possession of clients' funds or securities because the funds or securities are held by an affiliate of the investment adviser, can the investment adviser satisfy the audited balance sheet requirement of Item 14 of Part II by filing an audited balance sheet of the affiliate instead of an audited balance sheet for the investment adviser itself?

Response: No. The balance sheet required by Item 14 of Part II is that of the registrant. However, it should be noted that custody by an affiliate of an investment adviser is not deemed to be custody by the investment adviser in all circumstances. Whether custody by an affiliate of the investment adviser will trigger the audited balance sheet requirement is a factual matter based on the actual relationship between the investment adviser and the affiliate. See Crocker Investment Management Corp. (pub. avail. April 14, 1978) for a discussion of the staff's view of the factors to be considered in determining whether the adviser is deemed to have custody.

F. Schedules to Form ADV

1. Schedule A and Shareholder Disclosure

Question: For purposes of completing Schedule A, when must an applicant which is wholly or partially owned by a corporate parent provide information concerning shareholders of the parent, and how should such information be presented?

Response: As provided in Items 3 and 4 of Schedule A, all intermediate owners, as well as the ultimate owners of the applicant must be disclosed unless the intermediate owner is subject to the reporting requirements of Sections 12 or 15(d) of the Exchange Act. Thus, if a corporation owns 5% or more of the adviser, disclosure is required of shareholders that own 5% or more of a class of equity security of that corporation. If one of these shareholders is a corporation, similar disclosure of that corporation would be required until the ultimate owner is disclosed. If the adviser is a partnership, disclosure is required of general partners or any limited or special partners that have contributed 5% or more of the partnership capital. If one of the partners is a corporation, disclosure of all 5% shareholders would be required until the ultimate owner is disclosed. If the intermediate corporation or partnership is subject to the reporting requirements of Sections 12 or 15(d) of the Exchange Act, disclosure of that corporation's shareholders or partnership's partners is not required.

The method for indicating on Schedule A an indirect ownership interest in an investment adviser is to list the corporate parent's shareholders required to be so listed by virtue of their beneficial ownership of the adviser's equity securities. In the column designated "Ownership Code," the applicant should write "indirect" to indicate the indirect nature of the ownership interest for each listed shareholder.

2. Schedule A — Beginning Date

Question: Item 7 of Schedule A requires an applicant to disclose the "beginning date" of the relationship with the applicant for each of the persons reported on in the schedule. What does "beginning date" refer to?

Response: "Beginning date" refers to the earliest date on which a relationship arose with the adviser which was required to be disclosed on Schedule A. For example, if John Smith joined XYZ Advisers, Inc. in June 1978 as a research assistant and was promoted to vice president in August 1979, the first reportable event on Schedule A would have been Mr. Smith's promotion to vice president in August 1979, which date and relationship should have been disclosed on Schedule A to the Form ADV of XYZ Advisers, Inc. His subsequent promotion to president in July 1980 involves a change in relationship which would be disclosed on Schedule A, although the beginning date would remain as August 1979.

3. Schedule D — Employment and Affiliation History

Question: In answering Item 6 of Schedule D, must an applicant list each person's complete employment or affiliation history for the past ten years, including each position held with a particular employer, or may he provide only the identities of each person's employers?

Response: It is necessary to list on Schedule D all places of employment for the past ten years, for each person for whom a Schedule D is filed.[9] However, it is not necessary to enumerate each position held at each place of employment. It is sufficient to provide the last position held with each employer, so long as the period that such position was, or has been, held is disclosed in the column headed "Exact Nature of Connection or Employment."

REGULATORY FLEXIBILITY ACT

The views of the Commission's Division of Investment Management concerning Rules 203-1, 204-1, 204-3 and 206(4)-2 and Forms ADV and ADV-S are not rules and therefore are not subject to the Regulatory Flexibility Act [15 U.S.C. 600 et. seq.].

List of Subjects in 17 CFR Part 276

Investment advisers, Securities.

Accordingly, Part 276 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding Investment Advisers Act Release No. 1000, statement of staff interpretive positions as to investment adviser disclosure and reporting requirements. Investment Advisers Act Release No. 767 is hereby removed.

By the Commission.

John Wheeler
Secretary

December 3, 1985.

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[9] It should be noted that to the extent additional space is required to respond to Item 6, or any other Item of Schedule D, the instructions to Form ADV require that an additional copy of Schedule D be used. (The staff will not object, however, if the blank space on page 1 of Schedule D is used for continuing responses to Items 7 or 8 of Schedule D if the continued item is appropriately identified). Schedule F cannot be used as the continuation sheet for Schedule D.

TECHNICAL HOTLINE

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